Supreme Court, U.S.
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No. 95-1443

In the
Supreme Court of the United States
OCTOBER TERM, 1995

STORK BRABANT B.V. AND
STORK BRABANT, INC.,
Petitioners,

v.

JOSE D'ALMEIDA
and
GERRITSE PROJECTEN AND
ING. GERRITSE B.V.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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18 pp

QUESTION PRESENTED.

Whether a federal district court with diversity jurisdiction of a state law product liability action in which the injured plaintiff, a resident of the forum state who remains an active and interested party, may, consistent with traditional concepts of fair play and substantial justice embodied in the Due Process Clause of the Fourteenth Amendment, exercise specific personal jurisdiction over an alien corporation that has been sued for contribution and indemnification by its international distributor, also an alien corporation, where the former (i) designed and manufactured the product that allegedly caused injury in the forum state, (ii) knew the product was to be sold and delivered into the forum state, (iii) authorized one of its employee-engineers to travel to the forum state (at the request and in behalf of its distributor) to inspect and service the product and to advise the product purchaser (plaintiff's employer) concerning the operation, maintenance and repair of the product, and (iv) received a substantial sum in payment for the product and charged the distributor for engineering services rendered in the forum state.

CORPORATE DISCLOSURE STATEMENT OF PETITIONERS STORK BRABANT B.V. and STORK BRABANT, INC.

The names of all parties to the proceeding in the Court of Appeals for the First Circuit appear in the caption of the case.

In accordance with Sup. Ct. R. 14.1(b) and 29.6, petitioners Stork Brabant B.V. and Stork Brabant, Inc., make the following disclosure:

1. Stork Brabant B.V. is a limited liability company established in the Kingdom of The Netherlands, and is a wholly owned subsidiary of Stork N.V.

2. Stork N.V. is a limited liability company established in the Kingdom of The Netherlands and is publicly held. Its shares are listed on the stock exchanges of Amsterdam, Frankfurt, Dusseldorf, Zurich and Geneva.

3. Stork Brabant, Inc., a Delaware corporation, is a wholly owned subsidiary of Stork United Corporation.

4. Stork United Corporation, a Delaware corporation, is a wholly owned subsidiary of Stork A.G.

5. Stork A.G., a limited liability company established in Switzerland, is a wholly owned subsidiary of Stork N.V.

6. Neither Stork Brabant B.V. nor Stork Brabant, Inc., has subsidiaries.

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PETITION FOR WRIT OF CERTIORARI.

Petitioners Stork Brabant B.V. and Stork Brabant, Inc., respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on December 11, 1995.

OPINIONS BELOW.

The *per curiam* opinion of the Court of Appeals for the First Circuit and the concurring opinion of Bownes, J., are reported

at 71 F.3d 50 (1st Cir. 1995), and are reprinted in the Appendix to this Petition (App. A1-A5).[1] The order of the District Court (*per* Lindsay, D.J.) is not reported but is reprinted in the Appendix (App. A17), as is the Report and Recommendation of the Magistrate Judge (Bowler, U.S.M.J.) (App. A18-A36).

JURISDICTION.

The Court of Appeals entered its judgment on December 11, 1995 (App. A6). This Petition is timely filed within ninety (90) days of that entry. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED IN THE CASE.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, sec. 1; the so-called "long-arm statute" of Massachusetts, Mass. Gen. Laws, ch. 223A, § 3(d); the Massachusetts statute concerning the right of contribution among joint tortfeasors, Mass. Gen. Laws, ch. 231B, §§ 1 *et seq.*; and Massachusetts' comparative negligence statute, Mass. Gen. Laws, ch. 231, § 85, are involved in this case, and their pertinent text is set out in the Appendix (App. A40-A47).

STATEMENT OF THE CASE.

Procedural History.

Plaintiff Jose M. D'Almeida ("D'Almeida"), a resident of New Bedford, Massachusetts, commenced this product liability action

[1] The majority and concurring opinions, as reprinted in the Appendix, differ slightly from the reported opinions, as the Court of Appeals has issued two "Errata Sheets" amending the opinions since their publication. As reprinted in the Appendix, the opinions reflect these amendments.

against the petitioners, defendants/third-party plaintiffs Stork Brabant B.V., a Dutch corporation headquartered in the Kingdom of The Netherlands, and Stork Brabant, Inc., a Delaware corporation headquartered in North Carolina, in the Superior Court of Plymouth County, Massachusetts on March 23, 1992. The action was removed to the United States District Court for the District of Massachusetts on April 23, 1992, pursuant to 28 U.S.C. § 1441(a), as the District Court had original jurisdiction of the case under 28 U.S.C. § 1332(a) in light of the diversity of citizenship of the parties and the amount in controversy.

D'Almeida alleged that on or about February 22, 1991, he was operating a machine at his place of employment, Shawmut Mills, in West Bridgewater, Massachusetts, when, during that operation, "he sustained personal injuries, including permanent disfigurement and loss of function to his hands and fingers . . . [and] other damages." D'Almeida further alleged that his injuries and damages "were the direct and proximate result of the negligence and carelessness of the defendant[s]" and "breaches by the defendant[s] . . . [of] express and/or implied warranties". Stork Brabant B.V. and Stork Brabant, Inc. (collectively, "Stork"), answered, denied liability, and filed a third-party action against three Dutch entities, Gerritse Projecten, Ing. Gerritse B.V. and Texmach B.V.[2] Jan Gerritse ("Mr. Gerritse") later filed an affidavit wherein he explained that at one time he had done business as "Gerritse Projecten" and that he subsequently became "the founder and sole owner [through two holding companies] of the Dutch limited liability companies Ing. Gerritse B.V. and Texmach B.V."

Stork alleged that the respondents/third-party defendants designed and manufactured the machine involved in the plaintiff's accident and that "[i]f the plaintiff was injured as alleged . . .

[2] The Delaware corporation, Stork Brabant, Inc., did not exist at any time material to D'Almeida's Complaint, and affirmatively pleaded that D'Almeida's "Complaint should be dismissed as to this defendant, as this defendant was incorporated on April 22, 1991, two months after the alleged accident[,]" attaching a copy of its Certificate of Incorporation.

those injuries, if any, were caused by the negligent acts, omissions and/or breaches of warrant[ies] of [Gerritse Projecten, Ing. Gerritse B.V. and Texmach B.V.]" Stork set forth three counts each for common law indemnity, contractual indemnity, and contribution among joint tortfeasors under Mass. Gen. Laws, ch. 231B, §§ 1 *et seq*. (The text of the Massachusetts contribution statute is set forth in the Appendix at pp. A43-A46.)

Gerritse Projecten, Texmach B.V. and Ing. Gerritse B.V. (collectively, "Gerritse"), moved to dismiss the third-party action on the ground, *inter alia*, that the Court lacked *in personam* jurisdiction over them. Stork opposed the motion, and the matter was heard by the District Court (Bowler, U.S.M.J.) on April 8, 1994.[3]

Magistrate Judge Bowler issued her two-part Report and Recommendation on July 7, 1994, applying "the most common method of analyzing a motion to dismiss for lack of personal jurisdiction[,]" requiring that Stork make a "*prima facie* showing" (App. A18, A20-A21). The Magistrate Judge reported that "[i]n May, June and July 1985, Gerritse developed a calendering machine at the request of Stork," which Stork "eventually sold to Shawmut Mills, plaintiff's employer, in West Bridgewater, Massachusetts [a]nd, in February 1991, allegedly while operating the calendering machine, plaintiff sustained personal injuries." (App. A23.) The Magistrate Judge therefore concluded in Part IA of her Report and Recommendation that "Stork satisfie[d] its burden of showing that the tortious injury occurred in Massachusetts" under the so-called Massachusetts "long-arm statute," Mass. Gen. Laws, ch. 223A, §3(d) (App. A27). (The text of the Massachusetts "long-arm statute" is reprinted in the Appendix at pp. A41-A42.)

---

[3] After the hearing on the motion to dismiss but before the Magistrate Judge issued her Report and Recommendation, Stork voluntarily dismissed its claims against third-party defendant Texmach B.V., as Texmach B.V. successfully sought Dutch arbitration of its differences with Stork, whereas Ing. Gerritse B.V. was unsuccessful in its attempt at obtaining arbitration in The Netherlands.

In addressing a second statutory inquiry, *i.e.*, whether Gerritse "derive[d] substantial revenue from goods used or consumed or services rendered[ ] in this [C]ommonwealth[,]" the Magistrate Judge reported "[t]here [was] only one resale of a Gerritse calendering machine for the equivalent amount of $45,875[4] in United States currency which constituted 1.2% of Gerritse's revenue for the year in question." (App. A28.) From this, the Magistrate Judge concluded in Part IA of her Report and Recommendation, "Because of the small percentage of revenue, coupled with the fact that there exists only one resale, Stork fail[ed] to meet [this part of] its [statutory] burden." (App. A28.)

More germane to the issues raised in this Petition, the Magistrate Judge concluded in Part IB of her Report and Recommendation that "Stork fail[ed] to make a *prima facie* showing to satisfy Due Process." (App. A34.) She ruled both that Stork "fail[ed] to demonstrate that Gerritse purposely availed [itself] of the benefits and protections of a Massachusetts forum[;]" and that it would not be "fair" to require Gerritse to litigate this action in Massachusetts "simply because it contracted with a company with an international market and, at the behest of the company, sent a machine to a Massachusetts entity." (App. A33, A34.) The Magistrate Judge therefore recommended dismissal of the third-party action (App. A36).

On July 15, 1994, Stork objected to the Report and Recommendation, and asked the District Judge to make a *de novo* determination of the issues and to deny the motion to dismiss. On October 12, 1994, without further hearing, the District Judge (Lindsay, D.J.) rejected Part IA of the Magistrate Judge's Report and Recommendation concerning the Massachusetts "long-arm statute," but endorsed her due process analysis with the following Order:

---

[4] The figure $45,875 actually represents in American dollars the amount Gerritse received in Dutch guilders, and not the "resale" price to Shawmut Mills.

> While the Court disagrees with the analysis set forth in Part IA of this Report and Recommendation, the Court accepts the Report and Recommendation for reasons stated in the other parts thereof.

(App. A17.)

D'Almeida had also moved to amend his Complaint to add Gerritse as a defendant. In Part II of her Report and Recommendation, Magistrate Bowler wrote that "plaintiff's motion for leave to amend is futile on jurisdictional grounds." (App. A36.) D'Almeida timely objected to that part of the Report and Recommendation but, by his Order of October 12, 1994 (App. A17), the District Judge "accept[ed]" the Magistrate Judge's recommendation to deny D'Almeida's motion to add Gerritse as a direct defendant.[5]

On February 16, 1995, Stork moved under Fed. R. Civ. P. 54(b) for the entry of a separate and final judgment dismissing its third-party action so that it might appeal from the allowance of the motion to dismiss. That motion was not opposed and, on April 12, 1995, the District Court (*per* Lindsay, D.J.) ordered that a separate and final judgment be entered in accordance with an accompanying Memorandum of Decision (App. A10-A11, A12-A16). Judgment entered on April 20, 1995, dismissing the third-party action (App. A9). Stork appealed on May 2, 1995 (App. A7-A8). Jurisdiction of the appeal was conferred on the United States Court of Appeals for the First Circuit by 28 U.S.C. § 1291.

The Court of Appeals decided the case on December 11, 1995. Its *per curiam* opinion, affirming the dismissal of Stork's third-party action against Gerritse, is reported at 71 F.3d 50, and is set out in the Appendix to this Petition at pp. A1-A3. Bownes,

---

[5] D'Almeida did not appeal and is therefore, nominally, a respondent in this proceeding, Sup. Ct. R. 12.6, although he has an interest in the outcome of this dispute, as discussed, *infra* at 19-20.

J., concurred in the result and filed an opinion, which is also reproduced in the Appendix at pp. A4-A5.

The majority of the court eschewed discussion of the issue presented under the Massachusetts "long-arm statute," except to note "there is real doubt as to how the Massachusetts courts would decide the statutory issue . . ." (App. A2). It affirmed the order of the District Court, saying that "the 'fair play and substantial justice' requirement . . . was lacking" and "the assertion of jurisdiction over Gerritse in this indemnification and contribution action would . . . be unconstitutional." (App. A3.) In his concurring opinion, Judge Bownes wrote, "it is clear that under traditional 'minimum contacts' analysis there could be no personal jurisdiction over Gerritse." (App. A5.) Both opinions are excerpted in more detail, *infra* at 11-12, 13-20, following a recitation of facts material to the consideration of the question presented by this Petition.

Factual Background.

The material facts were supplied by affidavits and documentary exhibits submitted by Stork and Gerritse. In his affidavit, Mr. Gerritse described the machine involved in the plaintiff's accident as a "calender," which he explained is a "cylindered press[ ] for smoothing, glazing or coloring porous materials such as paper or fabric." Mr. Gerritse recounted that "[o]n September 1, 1975, [he] entered into a contract with Stork-Brabant B.V. for the development and manufacture of calenders . . ." and referred to a translation of that contract filed by Gerritse along with its motion to dismiss. Mr. Gerritse stated that when he signed that agreement with Stork (hereinafter, "the Agreement"), "[he] was doing business as 'Gerritse Projecten'." Mr. Gerritse asserted that "[since] August 22, 1979, the calender business ha[d] been conducted by Ing. Gerritse B.V. and Texmach B.V., and since 1979 Stork-Brabant B.V. ha[d] consistently dealt with those two companies under the [Agreement]."

The Agreement, signed and dated September 1, 1975, declared at the outset that "Gerritse has developed . . . a calendering machine for a vapor transfer printing process[ ]" and that "Stork produces a range of machines for the textiles industry *and sells these on the international market*." (Emphasis added.) The Agreement required that Stork purchase calendering machines from Gerritse and "immediately include them in its sales program and sell them or . . . have them sold *on the international market*." (Emphasis added.) Stork was further obligated to "pass on to Gerritse any information which it obtains from and on *the market*" with an eye to "developing *and modifying* the machines to bring them into line with *the market needs*." (Emphasis added.)

Mr. Gerritse identified Ing. Gerritse B.V. as the company that "manufactures" the calenders and Texmach B.V. as the "selling agent for Ing. Gerritse B.V." He recalled the "course of dealing" under the Agreement: "Stork Brabant B.V. would order from Texmach a stock of calenders, which would be built at the Ing. Gerritse plant." When Stork Brabant B.V. found a buyer, "it would draw one from the existing order." While "[t]he calenders are modular in design," Mr. Gerritse admitted that "Stork routinely ask[ed] that particular features be added or deleted once it ha[d] arranged a specific resale." The machine would then be sold to the ultimate purchaser under the "Stork" name.

Stork's Project and Service Manager, Henk Slort ("Slort"), also provided an affidavit, and recalled:

> On May 13, 1985, I sent a telex to Jan Gerritse . . . by which I notified Gerritse that 'it is very likely that we must deliver an LFC [laminating felt calender] 131/2000 to the USA at the end of June 1985' and that in order to meet this date of delivery, Gerritse should start to work on certain *modifications*, which were requested by the customer identified in the telex as 'Shawmut Mills - USA'.

(Emphasis added.)

"On June 10, 1985, [Slort] received a telex from Gerritse . . . in which Gerritse confirmed the 'Shawmut order' for an '*adaptation*' of the machine and quoted prices for certain *further modifications*. . . ." (Emphasis added.) Following that communication from Gerritse, Slort advised Gerritse by telex and by telephone of "certain of the *modifications* to be made for 'Shawmut Mills U.S.A.'" and a "*further modification* to the machinery ordered by 'Shawmut Mills-U.S.A.'" (Emphasis added.)

Mr. Gerritse denied "generally" that he and his companies knew "the specific identity of Stork's customers or the ultimate destination of any particular calender" and, more particularly, that "[e]xcept for the allegations made by Stork in their [third-party] complaint," Gerritse "ha[d] no information that any device made by the Gerritse calender companies or any of [his] other companies ever was sold or used in Massachusetts, or that the Gerritse calender companies or any other company that [he] own[s] has ever derived any revenue from goods or services used or consumed in Massachusetts. . . ."

Henk Slort recalled in his Affidavit, and Stork's records documented, a different story:

> On July 2, 1985, I sent Gerritse a copy of Stork's order form, attached and incorporated herein, both in the original Dutch and in an English translation, as Exhibit E, again identifying 'Shawmut Mills U.S.A.' as the customer and stating the customer's address as:
>
> Shawmut Mills
> 208 Manley Street
> West Bridgewater, MA
> 02379-1086
> U.S.A

Nonetheless, Mr. Gerritse continued to protest to the District Court that Stork would even "suggest that [Gerritse] knew, or cared, that the machine was going to Massachusetts."

Slort stated, and Stork's records documented, "On August 30, 1985, Texmach, B.V. invoiced Stork for the machine, as adapted for Shawmut Mills, in the total amount of Hfl. 144,645.50. . . ." According to the conversion rate for the Dutch guilder on August 30, 1985, this amounted to $45,875 in United States currency. Stork, in turn, delivered and sold the machine to Shawmut Mills, and Stork's commercial agent in the United States invoiced Shawmut Mills for a total of $99,999.50.[6]

In originally making his list of all the things his companies did *not* do in Massachusetts, Mr. Gerritse also asserted that they never "had employees travel in Massachusetts." Later, however, Mr. Gerritse modified this assertion and admitted that a Gerritse employee, Ronald Dekens ("Dekens"), made "a customer-relations stop-over . . . for Stork in Massachusetts in 1986."

Dekens also supplied an affidavit, saying he "ha[d] been employed by Ing. Gerritse B.V. . . . in the capacity of product engineer" since May of 1983. In that capacity, Dekens explained, his assistance was "[o]ccasionally" requested by Stork. As Dekens described it, "Stork would borrow [his] services" after first clearing the "loan" through Gerritse's plant manager, who required "the details of the job — when [Stork] need[ed Dekens], how long, and where." Once the "loan" was approved, Dekens would "present [him]self as a Stork employee" and "was given a Stork business card to distribute." Nevertheless, "[a]fter completion of [his] work on the assignment for Stork, *Gerritse would submit an invoice to Stork for the time recorded*." (Emphasis added.)

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[6] Sales of Gerritse calendering machines in the United States were not limited to the Shawmut Mills order. Stork sold other calendering machines built by Gerritse to other customers in several other states, both before and after the Shawmut Mills order. Indeed, the machines were sold around the world.

Dekens visited the Shawmut Mills factory in West Bridgewater, Massachusetts, on November 26, 1986, and wrote a four-page, handwritten record of his visit addressed to Stork's service manager, *and to two supervisory employees of "GSE" — Gerritse System Engineering* — which "supplied Stork with engineering services for calender machines produced by the Gerritse companies." The two Gerritse employees who received Dekens's report were Gerritse's Chief Engineer and Chief of Production.

Dekens's report reveals that he inspected and serviced the subject machine, and that he advised the plaintiff's employer on the use of the machine. Dekens detailed the condition of the machine, the adjustments he made, and his recommendations to Shawmut Mills. Among his observations was his finding that the machine's various emergency stops were "kapot." One translation of that word, offered by Dekens, is that it means "broken" or "disabled in the course of use." That was his finding while inspecting and servicing the subject machine in Massachusetts, four years and three months before the plaintiff's accident.

The Opinions from the Court of Appeals.

After alluding to these activities of Stork and Gerritse, the Court of Appeals majority commenced its "due process analysis" by observing, "Whether this course of conduct gave Gerritse 'minimum contacts' with the forum state as to satisfy the requirements of the due process clause . . . is a very close call." (App. A2) (citation omitted). Ignoring the procedural fact that D'Almeida had moved to amend his Complaint to add Gerritse as a defendant in the District Court and had timely objected to the Magistrate Judge's Report and Recommendation that his motion be denied as "futile on jurisdictional grounds" (App. A36), a majority of the Court of Appeals said, "we need not decide the [minimum contacts] issue, which would be especially difficult if the injured plaintiff in this case had brought suit against Ger-

ritse." (App. A3.) Instead, the court proceeded directly to the "requirement that the assertion of jurisdiction be 'consistent with traditional notions of fair play and substantial justice'" articulated by this Court in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945) (App. A3). Again omitting any mention of D'Almeida's attempt to sue Gerritse directly, the Court of Appeals emphasized that "Massachusetts' interest in the indemnification and contribution dispute [is] extremely limited, the compensation of its citizen not being at stake." (App. A3.) The court then cited this Court's decision in *Asahi Metal Industry Co.* v. *Superior Ct. of California*, 480 U.S. 102, 113-116 (1987), as controlling precedent, recounting that "eight justices applied the 'fair play and substantial justice' requirement to hold that jurisdiction was lacking in quite similar circumstances." (App. A3.) The court therefore declined to decide whether minimum contacts were present, and held, "the assertion of jurisdiction over Gerritse in this indemnification and contribution action would . . . be unconstitutional." (App. A3.)

In his concurring opinion, Bownes, J., agreed with the result reached by the majority but expressed "grave reservations about the short cut taken to get there." (App. A4.) Judge Bownes criticized this aspect of the majority's method, saying it "ignores established law and flies in the teeth of binding precedent." (App. A5.) He also disagreed with the majority's observations that the minimum contacts issue was "'a very close call'" and that it "'would be especially difficult if the injured plaintiff . . . had brought suit against Gerritse.'" (App. A5.) Judge Bownes was of the view that "Gerritse had no contacts with Massachusetts" and that "under the traditional 'minimum contacts' analysis there could be no personal jurisdiction over Gerritse." (App. A5.)

Stork now petitions this Court pursuant to Sup. Ct. R. 12 for a writ of *certiorari* to the United States Court of Appeals for the First Circuit.

REASONS FOR GRANTING THE WRIT.

I. PLAINTIFF'S PRODUCT LIABILITY ACTION, AND STORK'S THIRD-PARTY ACTION, ARISE OUT OF GERRITSE'S "MINIMUM CONTACTS" WITH MASSACHUSETTS, AND ALLOWING THE ACTION TO GO FORWARD AGAINST GERRITSE WOULD BE CONSISTENT WITH "FAIR PLAY AND SUBSTANTIAL JUSTICE."

While the majority of the Court of Appeals relied upon *Asahi Metal Industry Co., Ltd.* v. *Superior Ct. of California*, 480 U.S. 102 (1987) ("*Asahi*"), in deciding this case, it did so on the issue of "fair play and substantial justice" (App. A3). In his concurring opinion, Judge Bownes relied upon *Asahi* in performing his "'minimum contacts' analysis." (App. A4, A5.)[7] Since both relied upon *Asahi* so extensively, and since the procedural posture and circumstances of this case differ so markedly from those presented in *Asahi*, Stork submits that the majority has decided an important question of federal law that was left in doubt and undecided by this Court in *Asahi*; and that Judge Bownes has concurred in the result on the basis of legal reasoning that is both in conflict with relevant decisions of this Court and at variance with decisions from the Courts of Appeals for the Fifth and Eighth Circuits.[8]

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[7] As Judge Bownes read *Asahi*, "there was a holding albeit by a plurality: the facts 'do not establish minimum contacts such that the exercise of personal jurisdiction is consistent with fair play and substantial justice . . .'" (App. A4) (citation omitted).

[8] The division of opinion among the Justices in *Asahi* has been reflected among the courts of appeals. For example, the Fifth and the Eighth Circuits follow a more liberal, "stream of commerce" theory of personal jurisdiction than is generally followed by the First Circuit (and by Judge Bownes in this case). *See, e.g., Barone* v. *Rich Brothers Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994), *reh. and reh. en banc denied, cert. denied, Hosoya Fireworks Co., Ltd.* v. *Barone*, ___ U.S. ___, 115 S.Ct. 359 (1994); *Ruston Gas Turbines, Inc.* v. *Donaldson Company, Inc.*, 9 F.3d 415 (5th Cir. 1993); and *compare with Boit* v. *Gar-Tec Products, Inc.*, 967 F.2d 671, 682-683 (1st Cir. 1992).

This Court has long recognized the following principle:

> [I]f the sale of a product of a manufacturer . . . is simply not an isolated occurrence, but arises from the efforts of the manufacturer . . . to serve directly or indirectly the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury . . . to others.

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 286, 297 (1980) ("*Woodson*").

The plurality opinion in *Asahi*, 480 U.S. at 110-112, picked up this thread from *Woodson*, and required "*an action of the defendant purposefully directed toward the forum state*." *Id.* at 112 (emphasis in original). Although this part of the plurality opinion did not command a majority of this Court, it is consistent with decisional law in the First Circuit, *e.g.*, *Boit* v. *Gar-Tec Products, Inc.*, 967 F.2d at 682-683. Nonetheless, that court has also said, in an opinion authored by Breyer, J., that the holding in *Asahi* that California's state court could not assert specific personal jurisdiction "rested upon special features of the case," *Benitez-Allende* v. *Alcan Aluminio Do Brasil, S.A.*, 857 F.2d 26, 30, *cert. denied*, 489 U.S. 1018 (1st Cir. 1988).

Asahi is, however, both illustrative and instructive. In *Asahi*, a California citizen sued a Taiwanese tire tube manufacturer for damages arising out of his wife's death and the injuries he sustained in a motorcycle accident on a California highway. The tube manufacturer cross-claimed for indemnity from Asahi, the Japanese component manufacturer that made the tire valve. All defendants settled with the plaintiff, leaving only the cross-action against Asahi. *Asahi*, 480 U.S. at 106. "The record d[id] not include any contract between [the two companies]." *Id.* at 107. It also does not appear there was any documentation in support of the jurisdictional claim. It was simply asserted in the cross-claimant's affidavit that Asahi "was fully aware that valve stem

assemblies sold to [that c]ompany and to others *would end up* throughout the United States and in California." *Id.* (emphasis added).

By contrast with the component manufacturer in *Asahi*, Gerritse designed, manufactured and modified the *entire* product. It *knew* the subject calender machine was going to Shawmut Mills at 208 Manley Street in West Bridgewater, Massachusetts. One of its employees, engineer Ronald Dekens, *traveled to Massachusetts* for Stork, visited Shawmut Mills, inspected the machine, serviced it, advised its owner with respect to maintenance, operation and repair of the machine, and then prepared and filed a four-page report to Stork and two of his supervisors at Gerritse, detailing his activities and his findings at the Massachusetts factory four years and three months before the plaintiff's accident with the machine. Finally, Gerritse was paid for both the machine, as modified, and the service call made by Dekens.[9] This was much more than mere "awareness that the stream of commerce m[ight] or w[ould] sweep the product into the forum State" and much more than "the mere act of placing the product into the stream . . ." *Asahi*, 480 U.S. at 112.

In assessing the fairness and reasonableness of requiring Gerritse to defend this case in Massachusetts rather than The Netherlands, Gerritse's activities should be viewed in light of this Court's statement in *Woodson* that it is not unreasonable to subject a manufacturer to suit in a state where its allegedly defective product has been the source of injury if the sale of that product "is simply not an isolated occurrence, but arises from the efforts of the manufacturer . . . to serve directly or indirectly the market for its products in other States[.]" *Woodson*, 444 U.S. at 297. Stork and Gerritse together undertook to develop and sell calendering

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[9] Judge Bownes essentially recited these facts but found them insufficient to support the exercise of specific personal jurisdiction (App. A5). The majority observed in summary fashion, "Whether this course of conduct gave Gerritse 'minimum contacts' with the forum state as to satisfy the requirements of the due process clause . . . is a very close call." (App. A2) (citation omitted).

machines "on the international market." Their Agreement required that Stork purchase machines from Gerritse and "immediately include them in its sales program and sell them or . . . have them sold *on the international market*." (Emphasis added.)[10] Stork was further obligated to "pass on to Gerritse any information which it obtains from and on *the market*" with an eye to "developing *and modifying* the machines to bring them into line with *the market needs*." (Emphasis added.) Sales of Gerritse calendering machines in the United States were not limited to the Shawmut Mills order. Stork sold other calendering machines built by Gerritse to other customers in several states, and around the world. Thus, the sale of the subject machine in Massachusetts was no "isolated occurrence" but arose from the joint efforts of both Stork and Gerritse to serve the market "in other States." *Id.*

Massachusetts is, however, more than a market for commercial products and has its own interests at stake in this proceeding, which were left unaddressed by the Court of Appeals. In assessing the issue of fairness and reasonableness, the Magistrate Judge and, by extension, the District Judge conceded that "Massachusetts has an interest in ensuring compensation for personal injuries to its resident plaintiff and [that] a number of the witnesses to plaintiff's injuries likely reside in Massachusetts." (App. A34.) The District Court also allowed that "it would be beneficial to have all parties involved in the occurrence litigate their claims in a single forum." (App. A34.) A similar sentiment was expressed in the Memorandum of Decision (App. A15, A16) that accom-

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[10] Placing *Woodson* in historical context, the Eighth Circuit Court of Appeals has recently observed:

> Although a generation has not quite passed since *World-Wide Volkswagen* was decided, the acceleration in the internationalization of commerce is apparent. In this age of NAFTA and GATT, one can expect further globalization of commerce, and it is only reasonable for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states.

Barone v. *Rich Brothers Interstate Display Fireworks Co.*, 25 F.3d at 615.

panied the Order for entry of separate and final judgment (App. A10, A11). The District Judge wrote, "It makes sense, should the decision be reversed, to have Gerritse[ ] involved in both pre-trial and trial proceedings, so that all of the information can be exchanged at once, and so that all claims may be tried together in one forum." (App. A16.)[11] But when it appraised Massachusetts' interest in applying its rule of joint and several liability in product liability cases, and in enforcing the statutory right of contribution conferred by Mass. Gen. Laws, ch. 231B, §§ 1 *et seq.* (App. A43-A46), the District Court said only that "Massachusetts has little, if any, interest in ensuring that Stork is adequately reimbursed or indemnified for Gerritse's alleged negligent manufacture of the calendering machine at issue." (App. A34.)

The Court of Appeals affirmed, saying, "Massachusetts' interest in the indemnification and contribution dispute [is] extremely limited. . . ." (App. A3.) A federal court exercising diversity jurisdiction should be more sensitive in evaluating a forum state's legislative and judicial interests.

Massachusetts "has a strong expressed interest in 'furthering fundamental social policies' which have shaped [its] rule of law governing product liability actions." *Heins* v. *Wilhelm Loh Wetzlar Optical Machinery GmbH & Co. KG*, 26 Mass. App. Ct. 14, 26, 522 N.E.2d 989, 997, *review denied*, 402 Mass. 1105, 525 N.E.2d 678 (1988). It has no less of an interest in enforcing its rule of joint and several liability in tort, and contribution among joint tortfeasors under Mass. Gen. Laws, ch. 231B, §§ 1 *et seq.*

[11] Most of the sources of proof in this case, including the plaintiff, as well as his eyewitnesses, expert witnesses, medical witnesses and medical records are all located in Massachusetts. The calender machine which is the focus of D'Almeida's and Stork's claims is also located in Massachusetts. The machine, which is not amenable to rapid transport and is owned by neither Gerritse nor Stork, may also properly be subject to a view by the factfinder. Furthermore, the plant where the accident occurred, Shawmut Mills, is located in Massachusetts, as are its records concerning the plaintiff, the machine and the accident. And plaintiff's claims are governed by Massachusetts law, as are Stork's claims for contribution and common law indemnification against Gerritse.

(App. A43-A46). Stork's "right to contribution is derivative of the joint liability in tort [if any] of the third-party plaintiff[s] and the third-party defendant[s]." *Dighton* v. *Federal Pacific Electric Co.*, 399 Mass. 687, 691, 506 N.E.2d 509, 512, *cert. denied*, 484 U.S. 953 (1987). It is applicable to both the negligence and warranty claims. *Wolfe* v. *Ford Motor Co.*, 386 Mass. 95, 99-100, 434 N.E.2d 1008, 1010-11 (1982). Gerritse's liability on this part of Stork's third-party claim "ha[s] 'its roots in the underlying incident which gives rise to the personal injury.' " *Sword & Shield Restaurant, Inc.* v. *Amoco Oil Co.*, 11 Mass. App. Ct. 832, 833, 420 N.E.2d 32, 33 (1981) (citation omitted). Thus, Stork's "right to contribution c[ame] into being when the 'underlying incident' occur[red]." *Id.* And that incident, D'Almeida's accident, occurred in Massachusetts.

In addressing a claim for contribution under the statute (App. A43-A46), the Massachusetts Supreme Judicial Court has been especially attuned to the act's legislative purpose of promoting *fairness and equity* in the allocation of tort liability, and mindful of the old ills the statute was designed to cure:

> Chapter 231B is modeled on the Uniform Contribution Among Tortfeasors Act and describes the circumstances which give rise to the rights of contribution among tortfeasors. . . . In deciding which persons may be jointly liable in tort for the same injury, it is necessary to ascertain and carry out *the intent of the Legislature. The contribution statute is aimed at eliminating the unfairness of allowing a disproportionate share of a plaintiff's recovery to be borne by one of several joint tortfeasors. The object to be accomplished is a more equitable distribution of that burden among those liable in tort for the same injury*. . . . The statute should be interpreted in a manner that advances the objectives of the Legislature in enacting it. . . .

McGrath v. *Stanley*, 397 Mass. 775, 780-781, 493 N.E.2d 832, 835 (1986) (emphasis added).

It was error for the Court of Appeals to have ignored this forum state interest, especially since the court's holding is based upon "fair play and substantial justice" (App. A3). But the source of the court's error was its failure to recognize yet another key difference between this case and *Asahi*. *Asahi* concerned *only* a claim for *indemnification* asserted by a Taiwanese tire tube manufacturer against a Japanese valve component manufacturer arising out of a product liability *settlement*, and there were *no other parties* remaining in that litigation. *Asahi*, 480 U.S. at 106-107, 114. Here, the third-party action involves claims by Stork, as a machine distributor, against Gerritse, the machine designer and manufacturer, for *both indemnification and contribution*. Having overlooked this difference between this case and *Asahi*, the court failed to consider Massachusetts' interest in applying its rule of joint and several liability and in enforcing the *statutory right of contribution* among joint tortfeasors.

Among the salutary effects of Massachusetts' product liability law, rule of joint and several liability, statutory right of contribution, and comparative negligence statute, is the promotion of compromise settlements.[12] Thus, by way of further contrast with *Asahi*, where California's legitimate interests in the dispute had "considerably diminished" when all that remained was an indemnification action without the presence in the litigation of a California resident as plaintiff, *Asahi*, 480 U.S. at 114, here,

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[12] Whereas the comparative negligence statute provides, "In determining by what amount the plaintiff's damages shall be diminished . . . the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought[,]" Mass. Gen. Laws, c. 231, § 85 (App. A47), the contribution statute provides, "In determining the *pro rata* shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered . . ." Mass. Gen. Laws, c. 231B, § 2 (App. A44). The promotion of compromise settlements is even more pronounced in product liability actions, because the comparative negligence statute has no application where tort liability is predicated upon a breach of warranty. *Fernandes* v. *Union Bookbinding Co., Inc.*, 400 Mass. 27, 37, 507 N.E.2d 728, 734 (1987).

D'Almeida is a Massachusetts resident who was injured in Massachusetts and who has an interest in the outcome of this dispute. But the court erroneously concluded that, for Massachusetts, "the compensation of its citizen [is] not . . . at stake." (App. A3.) Indeed, the court incorrectly implied that D'Almeida did not attempt to sue Gerritse directly (App. A3) (case "would be especially difficult if the injured plaintiff in this case had brought suit against Gerritse[]"). In fact, D'Almeida moved to amend his Complaint to add Gerritse as a defendant but the Magistrate Judge reported that "plaintiff's motion for leave to amend is futile on jurisditional grounds[]" (App. A36), and the District Judge followed the recommendation to deny D'Almeida's motion (App. A17).

In short, Massachusetts' explicit desire to afford these remedies in product liability cases, including the statutory right of contribution, and its policy of bringing foreign tortfeasors within the jurisdiction of its courts, support the exercise of jurisdiction over Gerritse. The court's dismissive treatment of these interests in this diversity case was grave error, and should not be permitted to stand.

This Court anticipated in *Asahi* that there "often" will be instances "[w]hen minimum contacts have been established," and "the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *Id.* at 114. The "minimum contacts" of the third-party defendants with Massachusetts are, when balanced with all other factors, sufficient to permit the assertion of specific personal jurisdiction over Gerritse under the Due Process Clause.

Conclusion.

For these reasons, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1513

JOSE D'ALMEIDA
Plaintiff,

v.

STORK BRABANT B.V. AND STORK BRABANT, INC.,
Defendants/Third Party Plaintiffs-Appellants,

v.

GERRITSE PROJECTEN, TEXMACH. B.V.,
AND ING. GERRITSE, B.V.,
Third Party Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Reginald C. Lindsay, U.S. District Judge]

Before

Cyr, Circuit Judge,
Bownes, Senior Circuit Judge,
Boudin, Circuit Judge.

John J. McGivney, with whom Burns & Levinson was on brief for Stork Brabant, B.V. and Stork Brabant, Inc., defendants, third-party plaintiffs-appellants.

John T. Montgomery, with whom Jeffrey P. Trout, and Ropes & Gray, were on brief for Ing. Gerritse, B.V., third-party defendant-appellee.

December 11, 1995

Per Curiam. Stork Brabant B.V. and Stork Brabant, Inc. ("Stork") appeal from a judgment of the district court dismissing a third-party action for indemnification and contribution against Ing. Gerritse B.V. ("Gerritse"). The facts are set out at length in the Report and Recommendation of the magistrate judge; the legal issues are whether the Massachusetts long-arm statute, Mass. Gen. L. ch. 223A, §3(d), authorizes the assertion of personal jurisdiction over Gerritse, and, if so, whether such an assertion of jurisdiction is consistent with due process. Although we would normally decide the issue if possible on the basis of the statute, in this case there is real doubt as to how the Massachusetts courts would decide the statutory issue, and the resolution of the constitutional issue is, by contrast, reasonably clear. We therefore proceed to the due process analysis.

The third-party complaint, which we accept at this stage, reveals that Stork, as a distributor, ordered a machine from Gerritse; after negligently and/or in breach of warranty producing a defective machine, Gerritse sent it to Massachusetts on Stork's instruction. Whether this course of conduct gave Gerritse "minimum contacts" with the forum state as to satisfy the requirements of the due process clause, see International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), is a very close call.

The arguments on both sides are ably set forth in the magistrate judge's report; while she concluded that minimum contacts were not present, and the district court agreed, we need not decide the issue, which would be especially difficult if the injured plaintiff in this case had brought suit against Gerritse.

But even if minimum contacts were arguably present, due process further imposes a requirement that the assertion of jurisdiction be "consistent with traditional notions of fair play and substantial justice" International Shoe, 326 U.S. at 316, and this additional requirement controls here. The sole cause of action against Gerritse is an action by Stork for indemnification and contribution. The parties must reasonably have expected that any litigation between them would not take place in Massachusetts; indeed, their contract included a forum selection clause designating Holland as the locus of litigation. More important, Massachusetts' interest in the indemnification and contribution dispute are extremely limited, the compensation of its citizen not being at stake.

Extensive discussion is unnecessary because in our view this phase of the case is directly governed by Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 113-16 (1987). There eight justices applied the "fair play and substantial justice" requirement to hold that jurisdiction was lacking in quite similar circumstances. Thus, even if minimum contacts were barely present, a question we decline to answer, the assertion of jurisdiction over Gerritse in this indemnification and contribution action would still be unconstitutional.

Affirmed.

Concurrence follows.

BOWNES, Senior Circuit Judge, concurring. I agree with the result reached by the court, but I have grave reservations about the short cut taken to get there. On the basis of a head count of the Justices in Asahi Metal Indus. Co., 480 U.S. 102, the majority concludes that it need not determine whether the defendant had minimum contacts with Massachusetts "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). In Asahi there was a holding albeit by a plurality: the facts "do not establish minimum contacts such that the exercise of personal jurisdiction is consistent with fair play and substantial justice ...." 480 U.S. at 116. That is the only jurisdictional holding in the case. I do not think we should, on the basis of a head count, jettison as a prerequisite to a jurisdictional determination a "minimum contact" analysis. Up until now such an analysis has been the required starting front for a jurisdictional analysis.

The analysis as applied here, would run as follows: The question is whether Gerritse has sufficient minimum contacts with the forum state, such that the assertion of jurisdiction will not offend "traditional notions of fair play and substantial justice." International Shoe, 326 U.S. at 316. The test for the assertion of specific personal jurisdiction is tripartite. First, the claim underlying the litigation must arise out of or relate to the defendant's contacts with the forum state. See Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 414 (1984). Second, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). Third, the exercise of jurisdiction must be reasonable in light of the five criteria announced in Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985): (1) the defendant's burden of appearing, (2) the forum state's interest in

adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial systems' interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive policies.

I do not agree with the majority that the "minimum contacts" issue "is a very close call" and "would be especially difficult if the injured plaintiff ... had brought suit against Gerritse." The undisputed jurisdictional facts are as follows. Stork and Gerritse signed a contract in the Netherlands under which Gerritse would build machines exclusively for Stork. Both companies are headquartered in the Netherlands. Stork is a large international corporation that does business all over the world. Under the contract Stork agreed to purchase the machines manufactured by Gerritse and sell them on the international market. When the machine was finished to Stork's satisfaction, Stork supplied Gerritse with a mailing label and arranged to transport the machine to the buyer. Stork controlled all marketing, sales, and transportation of the machines.

Gerritse had no contacts with Massachusetts. It did know from the order form furnished it by Stork that the machine was going to Massachusetts. It was delivered to Shawmut Mills. Subsequent to the installation of the machine, Roland Dekens, an engineer-employee of Gerritse, while on a trip to the United States as an agent of Stork, inspected the machine at Shawmut Mills and submitted a report to both Stork and Gerritse.

I think it is clear that under the traditional "minimum contacts" analysis there could be no personal jurisdiction over Gerritse.

But even if the issue is a close one, as the majority states, that is no excuse for not deciding it. To apply the "fair play and substantial justice" doctrine without any "minimum contacts" analysis ignores established law and flies in the teeth of binding precedent.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1513

JOSE D'ALMEIDA
Plaintiff-Appellee

v.

STORK BRABANT B.V., et al.,
Third Party Defendants-Appellants,

v.

GERRITSE PROJECTEN, et al.,
Third Party Defendants-Appellees.

JUDGMENT

Entered: December 11, 1995

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano, Clerk

cc: John J. McGivney, Esq.
John T. Montgomery, Esq.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOSE M. D'ALMEIDA, Plaintiff, v. STORK-BRABANT, B.V. and STORK-BRABANT, INC., Defendants/ Third-Party Plaintiffs v. GERRITSEN PROJECTEN, B.V., TEXMACH, B.V. and ING. GERRITSEN, B.V., Third-Party Defendants.	)	Civil Action No. 92-10944-RCL

NOTICE OF APPEAL

Notice is hereby given that defendants/third-party plaintiffs Stork Brabant B.V. (Stork B.V.) and Stork Brabant, Inc. (Stork Inc.), hereby appeal to the United States Court of Appeals for the First Circuit from (1) the Order of District Judge Lindsay dated October 12, 1994 accepting in part the Report and

Recommendation of Magistrate Judge Bowler entered on July 7, 1994, and dismissing the third-party action, and (2) the judgment in favor of third-party defendants Gerritse Projecten and Ing. Gerritse B.V., and against Stork B.V. and Stork, Inc., entered on April 20, 1995 pursuant to an Order of District Judge Lindsay dated April 12, 1995.

STORK BRABANT B.V. and
STORK BRABANT, INC.,

By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served by hand on May 2, 1995 upon the attorney of record for each other party.

Lawrence J. McNally, Jr.
BBO No. 549359

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Jose M. D'Almeida,
Plaintiff

CIVIL ACTION NO. 92-10944-RCL

v.

Stork-Brabant, B.V. and
Stork-Brabant, Inc.,
Defendants/
Third-Party Plaintiffs

v.

Gerritsen Projekten, B.V.,
Texmach, B.V. and
Ing. Gerritsen, B.V.
Third-Party
Defendants

JUDGMENT

In accordance with the Memorandum of Decision entered on April 12, 1995; it is ordered that separate and final judgment is hereby entered in favor of the Third-Party Defendants, Gerritsen Projecten and Ing. Gerritsen, B.V. as against the Defendants/Third-Party Plaintiffs, Stork, B.V. and Stork, Inc.

April 20, 1995

ROBERT J. SMITH, JR.
CLERK

By:_____
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Jose M. D'Almeida, Plaintiff	)	
v.	)	Civil Action No. 92-10944-RCL
Stork-Brabant, B.V. and Stork-Brabant, Inc.,	)	
Defendants/ Third-Party Plaintiffs	)	
v.	)	
Gerritsen Projecten, B.V. Texmach, B.V. and Ing. Gerritsen, B.V.,	)	
Third-Party Defendants	)	

ORDER

Defendants/Third-Party Plaintiffs Stork-Brabant, B.V. ("Stork, B.V.") and Stork-Brabant, Inc. ("Stork, Inc.") have moved, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that separate and final judgment enter for Third-Party Defendants Gerritsen Projecten and Ing. Gerritsen, B.V. on the

third-party complaint of Stork, B.V. and Stork, Inc. For the reasons stated in the accompanying Memorandum of Decision, the Defendants'/Third-Party Plaintiffs' motion is granted, and the court determines that there is no just reason for delay. It is hereby ordered that separate and final judgment shall enter against Stork, B.V. and Stork, Inc., in favor of Gerritsen Projecten and Ing. Gerritsen, B.V.

So ordered.

Reginald C. Lindsay

_____

United States District Judge

Dated: 4/12/95

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Jose M. D'Almeida, Plaintiff v. Stork-Brabant, B.V. and Stork-Brabant, Inc., Defendants/ Third-Party Plaintiffs v. Gerritsen Projecten, B.V., Texmach, B.V. and Ing. Gerritsen, B.V., Third-Party Defendants	Civil Action No. 92-10944-RCL

Memorandum of Decision

Lindsay, District Judge

On October 12, 1994, this court accepted in part the Magistrate Judge's Report and Recommendation in this case, thus allowing the third-party defendants' motion to dismiss the third-

party plaintiffs' claims against them due to a lack of personal jurisdiction. The action arose from Jose D'Almeida's alleged injuries while using a laminating or "calender" machine, supplied by defendants/third-party plaintiffs Stork-Brabant, B.V. and Stork-Brabant, Inc. ("Stork"), and manufactured by third-party defendants Gerritsen Projecten, B.V. and Ing. Gerritsen, B.V. ("Gerritsen"). D'Almeida sued Stork, claiming that the machine was defective in design and manufacture. Stork sued Gerritsen, asserting claims of tort-based indemnification, contractual indemnification, and contribution under M.G.L. c. 231B. The dismissal for lack of personal jurisdiction disposed of all claims against Gerritsen.

Stork now moves that this court enter separate and final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. No opposition was filed. For the following reasons, this court grants the motion.

In evaluating the propriety of certification under Rule 54(b), the trial court must engage in a two-part test. First, the court must assess the finalty of the disputed ruling. *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 42 (1st Cir. 1988). "[T]he ruling underlying the proposed judgment must itself be final in the sense that it disposes completely either of all claims against a given defendant or of some discrete substantive claim or set of claims against the defendants generally." *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 580 (1st Cir. 1994).

The second step, after the trial court has determined that the ruling is final, is to ascertain whether "there is no just reason for delay," in the words of Rule 54(b). "The process, tilted from the start against fragmentation as a whole, and a weighing of all factors relevant to the desirability of relaxing the usual prohibition against piecemeal appellate review in the particular circumstances." *Spiegel*, 843 F.2d at 43.

The First Circuit has commended, as a helpful guide, the following factors enunciated in *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 364 (3rd Cir. 1975):

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

See Spiegel, 843 F.2d at 43, n. 3. *See Also Maldonado-Denis*, 23 F.3d at 580; *Kersey v. Dennison Mfg. Co.*, 3 F.3d 482, 486 (1st Cir. 1993).

The Rule 54(b) evaluation is discretionary, is accorded "substantial deference," and is not to be reversed unless certification was "clearly unreasonable." *Kersey*, 3 F.3d at 486.

Applying the Rule 54(b) test to this case, this court concludes that there is no question that the dismissal for lack of jurisdiction was final. This court dismissed *all* of the claims against Gerritsen. A dismissal for lack of jurisdiction is final under Rule 54(b). *See Chamberlain v. Harnischfeger Corp.*, 516 F.Supp. 428, 429 (E.D. Pa. 1981) ("A dismissal for lack of personal jurisdiction disposes of the claim completely against that party"); *Demelo v. Woolsey Marine Industries, Inc.*, 677 F.2d 1030, 1031 (5th Cir. 1982) ("As the order in question disposed of all claims against [the defendant], it clearly had the requisite finality to be appealable..."); *Core-Vent Corp v. Nobel Industries AB*, 11 F.3d 1482, 1484 (9th Cir. 1993); 10 Wright & Miller, *Federal Practice and Procedure*, §2656, p. 51 (1983) (dismissal for lack of personal jurisdiction is final for the purposes of Rule 54(b)).

As to the second part of the test, the court concludes that there is "no just reason for delay." The factors cited above all point toward review now, rather than later.

1. Relationship Between the Adjudicated and Unadjudicated Claims.

The underlying adjudicated claims are related. They all revolve around responsibility for the claimed defects in the laminating machine. It would better serve the administration of justice to resolve all of these claims at one time, in one trial, should the First Circuit hold that this court was in error in its determination that personal jurisdiction was lacking. *See Core-Vent*, 11 F.3d at 1484; *Chamberlain*, 516 F.Supp. at 430.

The issue on appeal is not related to any issues in the underlying case. The only issue to be considered by the First Circuit would be whether this court properly granted the motion to dismiss for lack of personal jurisdiction. *See Core-Vent*, 11 F.3d at 1184 ("The jurisdictional question at issue here is unrelated to the other issues in the case" and is "easily severable from the merits of the lawsuit"); *Chamberlain*, 516 F.Supp. at 430 (personal jurisdiction is a "discrete issue").

2. Possibility of Future Mootness.

The issue on the appeal likely will not become mooted by future developments in this court. If the plaintiff prevails, Stork will seek indemnification from Gerritsen. If the plaintiff loses, Stork may still pursue indemnification for legal fees and costs incurred in litigating against the plaintiff. *See Amoco Oil Company, Inc. v. Buckley Heating, Inc.*, 495 N.E.2d 875, 876 (Mass. App. 1986).

3. Possibility That First Circuit Will Have to Review Decision Twice.

A dismissal for lack of personal jurisdiction will be reviewable only once, so there is no fear that the First Circuit will have to be faced with the same issue more than once. *See Chamberlain*, 516 F.Supp. at 430 ("Should the Circuit Court

determine the jurisdictional issue presented at this time, it would not reappear post trial if an appeal were then taken").

4. Set-Off Possibility.

There is no claim or counterclaim in this case which could result in a setoff against the judgment.

5. Miscellaneous Factors.

If the First Circuit decides to reverse this court's ruling on the motion to dismiss, it would be better to have that decision come now. The parties would be able to engage in discovery as to all parties involved in the underlying dispute. Gerritsen manufactured the allegedly defective machine. It makes sense, should the decision be reversed, to have Gerritsen involved both in pre-trial and trial proceedings, so that all of the information can be exchanged at once, and so that all claims may be tried together in one forum. Both fairness and efficiency dictate immediate review of this court's decision.

The court will issue an order for separate and final judgment on this date.

Reginald C. Lindsay

United States District Judge

Date: 4/12/95

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOSE M. D'ALMEIDA,
Plaintiff,

CIVIL ACTION NO.
92-10944-RCL

v.

STORK-BRABANT, B.V. and
STORK-BRABANT, INC.,
Defendants,

v.

GERRITSEN PROJEKTEN, B.V.,
TEXMACH, B.V. and
ING. GERRITSEN, B.V.
Third-Party Defendants.

ORDER ON
REPORT AND RECOMMENDATION RE:
MOTION OF TEXMACH, B.V. AND ING. GERRITSE B.V.
FOR DISMISSAL OR STAY OF THIRD-PARTY ACTION
(DOCKET ENTRY #24); PLAINTIFF'S MOTION FOR
LEAVE OF COURT TO AMEND COMPLAINT
(DOCKET ENTRY #43)

While the Court disagrees with the analysis set forth in part IA of this Report and Recommendation, the Court accepts the Report and Recommendation for reasons stated in the other parts thereof.

Reginald C. Lindsay,
U.S.D.J.
October 12, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOSE M. D'ALMEIDA,
Plaintiff,

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REPORT AND RECOMMENDATION RE:
MOTION OF TEXMACH, B.V. AND ING. GERRITSE B.V.
FOR DISMISSAL OR STAY OF THIRD-PARTY ACTION
(DOCKET ENTRY #24); PLAINTIFF'S MOTION FOR
LEAVE OF COURT TO AMEND COMPLAINT
(DOCKET ENTRY #43)

July 7, 1994

BOWLER, U.S.M.J.

Pending before this court are the following two motions: (1) Plaintiff's Motion for Leave of Court to Amend Complaint (Docket Entry # 43); and (2) the motion of third party defendants

Texmach, B.V. ("Texmach") and Ing. Gerritse B.V. ("Ing. Gerritse") to dismiss or stay the third party action filed against them by defendants Stork-Brabant, B.V. ("Stork, B.V.") and Stork Brabant, Inc. ("Stork, Inc.") (collectively: "Stork") (Docket Entry #24).[1] On April 8, 1994, this court heard oral argument that took the motions (Docket Entry ## 24 & 43) under advisement (Docket Entry # 53).

Both the opposition to the motion to amend (Docket Entry # 45) and the memorandum in support of the motion to dismiss (Docket Entry # 25) raise the argument that this court lacks in personam jurisdiction over Texmach and Ing. Gerritse (collectively: "Gerritse"), two Dutch limited liability companies owned by Jan Gerritse, a resident of The Netherlands. (Docket Entry # 27).

The instant litigation stems from personal injuries allegedly suffered by plaintiff Jose M. D'Almeida ("plaintiff") while operating a machine manufactured by Gerritse in The Netherlands. Plaintiff purportedly suffered the injuries while operating the machine at Shawmut Mills, plaintiff's employer, located in West Bridgewater, Massachusetts. Plaintiff originally filed suit against Stork, B.V. under product liability and breach of warranty theories. Plaintiff subsequently amended his complaint to include

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[1] Stork filed the third party action against three Dutch entities, to wit, Gerritsen Projekten, B.V., Texmach, B.V. and Ing. Gerritsen, B.V. (Docket Entry # 16). In their opposition to the motion to dismiss, however, Stork adopts the spelling of the first and third entities as taken from the affidavit of Jan Gerritse, i.e., Gerritse Projecten and Ing. Gerritse B.V. (Docket Entry # 33). As averred by Jan Gerritse, there is no such entity as "Gerritsen Projekten B.V." (Docket Entry # 27, ¶ 6).

On April 23, 1994, Stork filed a notice voluntarily dismissing their third party claims in counts IV, V and VI against Texmach. (Docket Entry # 57).

Stork, Inc. Stork filed a third party complaint against Gerritsen Projekten, B.V., Texmach and Ing. Gerritsen, B.V. (Docket Entry # 16).

On June 7, 1994, this court issued a Procedural Order because of a conflict in the record. After explaining the evidentiary conflict and noting that neither party had requested an evidentiary hearing, this court provided the parties up to and including June 21, 1994, to request an evidentiary hearing and/or to submit additional evidence. The matter is presently ripe for review.

Neither party requested an evidentiary hearing. See General Contracting & Trading v. Interpole, Inc., 899 F.2d 109, 115 (1st Cir. 1990) (recognizing that in certain circumstances a matter can be adequately heard on papers and that proponent of evidentiary hearing must ask for one). By letter dated June 17, 1994, Stork, B.V. concedes that Ronald Dekens ("Dekens"), a Gerritse employee, did not travel to Shamwut Mills in West Bridgewater, Massachusetts, on behalf of Stork, B.V., to service the calendering machine at issue in August and September of 1985. The jurisdictional fact involving credibility is therefore undisputed and the parties, despite the explicit opportunity presented in the June 7, 1994 Procedural Order, did not request an evidentiary hearing. See Boit v. Gar-Tec Products, Inc., 967 F.2d. 671, 676 (1st Cir. 1992);[2] General Contracting & Trading v. Interpole, Inc., 899 F.2d at 115.

While this court has the "discretion to determine which procedures to employ in resolving the jurisdictional issue," Bank One, Texas, N.A. v. Montle, 964 F.2d 48, 51 (1st Cir. 1992), the most common method of analyzing a motion to dismiss for lack of personal jurisdiction is to consider whether the plaintiff proffers

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[2] This court cited the parties to Boit in the June 7, 1994 Procedural Order.

sufficient credible evidence to support "all facts essential to personal jurisdiction." Boit v. Bar-Tech Products, Inc., 967 F.2d at 675. Under this prima facie showing, Stork must establish "every fact required to satisfy 'both the forum's long-arm statute and the due process clause of the Constitution.'" Boit v. Bar-Tech Products, Inc., 967 F.2d at 675; see also Ticketmaster-New York v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994).

Facts are drawn "from the pleadings and the parties' supplementary filings, including affidavits, taking facts affirmatively alleged by plaintiff as true and construing disputed facts in the light most hospitable to plaintiff." Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994). Stork, however, "may not rely on unsupported allegations in [their] pleadings to make a prima facie showing of personal jurisdiction." Boit v. Bar-Tech Products, Inc., 967 F.2d at 675.

BACKGROUND

Texmach and Ing. Gerritse, two Dutch limited liability companies owned by Jan Gerritse, a resident of The Netherlands, have their sole place of business in Brummen, The Netherlands. Texmach operates as the selling agent for "calendering machines" manufactured by Ing. Gerritse at its plant in Brummen. "Calenders" are "cylindered presses for smoothing, glazing or coloring porous materials such as paper." Ing. Gerritse also manufactures "wrapping machines" and, more recently, "ink dosing systems." (Docket Entry # 27).

In September 1975, Jan Gerritse signed a contract (Docket Entry # 26, Ex. 1) with Stork B.V. on behalf of "Gerritse Projecten."[3] (Docket Entry # 27). As noted in the contract, the parties signed the agreement in Boxmeer, The Netherlands. The contract provides for the application of the laws of The

[3] The body of the contract refers to "Gerritse Projecten" while the signature line spells the entity as "Gerritse Projekten."

Netherlands and arbitration of "disputes arising in connection with the agreement." (Docket Entry # 26, Ex. 1).

Under the contract, Jan Gerritse agreed to develop and to supply Stork, B.V. with calendering machines and additionally gave Stork, B.V. the exclusive license to sell the calendering machines on the international market. (Docket Entry # 26, Ex. 1).

Specifically, the contract noted that Stork, B.V. sells machines "on the international market" and that Stork, B.V. "wishes to include [the Gerritse calendering] machines in its sales program on an exclusive basis." The contract expressly states that Stork, B.V. shall purchase and sell the calendering machines "on the international market." (Docket Entry # 26, Ex. 1).

While Jan Gerritse did business as "Gerritse Projecten" at the time he signed the contract, since August 1979, he has conducted his calendering business through the two limited liability companies, Texmach and Ing. Gerritse, collectively referred to as Gerritse. At or around the time the parties executed the September 1975 contract, Gerritse Projecten employed six individuals and generated 1.1 million guilders in business. In contrast, Stork, B.V. employed an estimated 23,000 individuals and generated an estimated 1.9 billion guilders in business. (Docket Entry ## 27 & 41). Therefore, under the contract, it was foreseeable that Gerritse's calendering machines would be sold on the international market.

Under the contract, Stork, B.V. would order a stock of "calenders" (usually five) from Texmach. Gerritse then built the calendering machines at the Ing. Gerritse plant in Brummen. Calenders are modular in design. Upon locating a buyer, Stork, B.V. routinely requested that Gerritse add or delete particular features to the calendering machines. Stork, B.V. ordinarily set the date for Ing. Gerritse to finish manufacturing the machine, as modified, and then sent its technicians to the Ing. Gerritse plant to inspect the finished machine. Typically, after inspecting the machine, Stork, B.V. supplied Ing. Gerritse with an address label and used the services of a Dutch company, Meilink, to package the

machine for shipping under the Stork label. Stork, B.V. then sent a transport company to transport the machine to the buyer. Jan Gerritse avers that Gerritse generally "had no information as to the specific identity of Stork's customers or the ultimate destination of any particular calender" machine. (Docket Entry ## 27 & 41).

In May, June and July 1985, Gerritse developed a calendering machine at the request of Stork, B.V. The calendering machine was eventually sold to Shawmut Mills, plaintiff's employer, in West Bridgewater, Massachusetts. And, in February 1991, allegedly while operating the calendering machine, plaintiff sustained personal injuries. This machine is the only calendering machine manufactured by Ing. Gerritse which Gerritse sold to Stork and which Stork then resold to an entity or individual located in Massachusetts. Having checked Gerritse's records and with the exception of the above noted calendering machine, Jan Gerritse asseverates that there is no indication that any Gerritse calendering machine was ever sold by Stork to anyone in Massachusetts. Stork sold Gerritse calendering machines to other United States customers, albeit none located in Massachusetts, both before and after the sale to Shawmut Mills. (Docket Entry # 34, Ex. 4; Docket Entry # # 27 & 41).

As to the calendering machine at issue, Stork initially ordered the machine in 1983. Gerritse built the machine without knowing the Massachusetts location of the eventual purchaser. In May 1985, Henk Slort ("Slort"), Project and Service Manager of Stork, B.V. in The Netherlands, sent a telex to Jan Gerritse setting a delivery date for the calendering machine for "the end of June 1985" and identifying the purchaser as "Shawmut Mills-U.S.A." Stork, B.V. set forth particular modifications for the machine in the telex. On June 10, 1985, Slort received a telex from Gerritse confirming the order and noting the explicit modifications. Also on June 10, 1985, Slort sent Gerritse another telex again identifying the purchaser as "Shawmut Mills U.S.A." (Docket Entry # 34, Ex. 4 & A-C; Docket Entry # 41).

Gerritse completed manufacturing the machine, as modified, before Stork identified the Massachusetts location of Shawmut Mills on July 2, 1985. On July 2, 1985, Slort sent Gerritse an order form identifying the location of Shawmut Mills as West Bridgewater, Massachusetts. (Docket Entry # 34, Ex. 4 & E; Docket Entry # 41).

Stork's initial purchase of the machine constituted 1.2% of Gerritse's annual revenues. In August 1985, Texmach invoiced Stork, B.V. for the machine, as modified, for a total amount of $45,875.[4] (Docket Entry # 34, Ex. 4, 5, F & G; Docket Entry # 41).

Stork occasionally used the services of Ronald Dekens ("Dekens"), a Gerritse employee, to install Gerritse calendering machines. Dekens received instructions for his work from Slort or other Stork personnel. From August 19, 1985, to September 3, 1985, Dekens attests that he worked on the calendering machine at issue for Stork in Belgium. Dekens' time records note the country "Belgie." Dekens also attests that during his work for Stork, he used a Stork business card and presented himself as a Stork employee. Dekens was not in Massachusetts in August and September of 1985. (Docket Entry # 40 & Ex. 2).

In November 1986, Stork requested Dekens' assistance for an 11 day period for two of its customers in the United States. Neither customer was located in Massachusetts. Dekens spent his time in New Jersey and Pennsylvania. During his visit, Slort asked Dekens to visit the Shawmut Mills facility. In compliance with the request, on November 26, 1985, Dekens spent one day at Shawmut Mills in Massachusetts and inspected the calendering machine at issue on Stork's behalf. (Docket Entry ## 40, 41 & 55).

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[4] This amount represents the equivalent amount in United States currency to the amount noted in the invoice in Dutch guilders.

Finally, Gerritse does not maintain an agent for service of process in Massachusetts nor is Gerritse registered to do business in Massachusetts. Further, Gerritse does not have any telephone listing or employees located in Massachusetts. Gerritse has never advertised its products in Massachusetts or actively solicited any business in Massachusetts. (Docket Entry # 27).

I. MOTION OF TEXMACH, B.V. AND ING. GERRITSE B.V. FOR DISMISSAL OR STAY OF THIRD-PARTY ACTION (DOCKET ENTRY # 24)

Gerritse moves to dismiss the third party complaint for lack of in personam jurisdiction over Texmach and Ing. Gerritse.[5] Stork filed the third party complaint seeking contractual contribution, common law indemnity and contribution from Texmach, Ing. Gerritsen, B.V. and Gerritsen Projekten, B.V.[6] based on alleged breach of warranties. Gerritse also moves to dismiss the third party complaint in light of the forum selection and arbitration clauses in the contract and under the doctrine of forum non conveniens. (Docket Entry # 24).

"The existence of personal jurisdiction must be established before [emphasis added] a court may consider the merits of a motion to dismiss that is based on the doctrine of forum non conveniens." Boudreau v. Scitex Corporation, Ltd., 1992 WL 159667 at * 1 (D.Mass. June 25, 1992). Similarly, in the event this court lacks jurisdiction over Gerritse, this court cannot resolve the merits of the contractual interpretation arguments. Accordingly, this court turns to the issue of in personam

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[5] To the extent Gerritse has an obligation to answer the third party complaint on behalf of Gerritsen Projekten, B.V., Gerritse additionally seeks to dismiss the third party complaint inasmuch as there is no such entity as Gerritsen Projekten, B.V.

[6] See footnote number one.

jurisdiction.

A federal court sitting in diversity applies the law of the forum state (Massachusetts) to determine the defendants' amenability to suit in this district. Hahn v. Vermont Law School, 698 F.2d 48, 49 (1st Cir. 1983). Stork bears the burden of proof to establish facts supporting the existence of jurisdiction. United Electrical Radio and Machine Workers of America v. 163 Pleasant Street Corporation, 960 F.2d 1080, 1090 (1st Cir. 1992). The inquiry is twofold. There must be a showing of sufficient contacts to satisfy both the Massachusetts long arm statute and the Due Process Clause. Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994); Boit v. Bar-Tech Products, Inc., 967 F.2d at 675. In opposition to the motion to dismiss, Stork relies on section 3(d) of the Massachusetts long arm statute. Mass. Gen. L. ch. 223A, § 3(d). This court therefore addresses the existence of jurisdiction under section 3(d).

A. Section 3(d)

Section 3(d) permits the exercise of personal jurisdiction over a foreign corporation:

> Who acts, directly or by an agent, as to a cause of action in law or equity arising from the [corporation's] ... (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if [the corporation] regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth.

Mass. Gen. L. ch. 223A, § 3(d). Section 3(d) "has two components: the injury and the conduct." Catrone v. Ogden Suffolk Down, Inc., 647 F.Supp. 850, 857 (D.Mass. 1986). As to Gerritse's conduct, Stork argues that Gerritse derived "substantial revenue" from Massachusetts.

Turning to the injury component, Stork must show a tortious injury in Massachusetts. For example, an injury to a Massachusetts resident occurring in Maine does not result in a

"tortious injury in the commonwealth" within the meaning of section 3(d) despite the fact that the plaintiff receives treatment in Massachusetts for his injuries. Walsh v. National Seating Co., Inc., 411 F.Supp. 564, 571 (D.Mass. 1976); accord Mello v. K-Mart Corporation, 604 F.Supp. 769, 771-772 (D.Mass. 1985) (injury to Massachusetts resident occurring in Tennessee with treatment in Massachusetts did not create injury in Massachusetts under section 3(d)). On the other hand, an injury to a plaintiff/employee in Massachusetts resulting from an allegedly negligently designed machine manufactured by a West German corporation satisfies section 3(d)'s "tortious injury in the commonwealth" requirement. Heins v. Wilhelm Loh Wetzlar Optical, 522 N.E.2d 989, 993 (Mass.App.Ct. 1988).

As to the motion to amend discussed in Part II, Heins is controlling inasmuch as plaintiff is seeking to file claims directly against Gerritse, the manufacturer, for the alleged negligent design of the machine and the resulting injuries occurring to him in Massachusetts. Stork, however, is one step removed from Heins. Stork is suing Gerritse for contribution and indemnity for breach of warranties resulting from an injury to a third party, plaintiff, located in Massachusetts. Nevertheless, the injuries resulted from the use of Gerritse's machines in Massachusetts. See, e.g., Roxse Homes, Inc. v. United States Mineral Products Company, 1987 WL 13804 at * 3 (D.Mass. July 10, 1987) (noting alleged injury in Massachusetts resulted from use of the defendant's products). The injury, rather than the mere accumulation of medical expenses, occurred in Massachusetts. In light of Heins, this court finds that Stork satisfies its burden of showing that the tortious injury occurred in Massachusetts under section 3(d).

The more troubling inquiry is whether Gerritse received "substantial revenue" within the meaning of section 3(d). Stork contends that because Texmach received the equivalent amount of $45,875 in United States currency for the calendering machine at issue and monies for Dekens' services, Gerritse derived "substantial revenue" under section 3(d).

"'[S]ubstantial revenue' is not an absolute amount nor an absolute percentage of total sale." Keds Corporation v. Renee International Trading Corporation, 888 F.2d 215, 219 (1st Cir. 1989) (one order for 6,000 pairs of shoes for $15,000 constituted "substantial revenue" under section 3(d)). The term is liberally construed, Buckeye Associates v. Fila Sports, Inc., 616 F.Supp. 1484, 1493 (D.Mass. 1985), and generally arises from receiving revenue from multiple or repeated sales of products in Massachusetts. See, e.g., Heins v. Wilhelm Loh Wetzlar Optical, 522 N.E.2d at 993-994 (estimated $56,000 sales price plus presence of many other machines in Massachusetts permitted inference of substantial revenue); Buckeye Associates v. Fila Sports, Inc., 616 F.Supp. at 1494-1494 (less than 2% of sales in Massachusetts insufficient inasmuch as there was no evidence of volume of sales in Massachusetts). Also, the statute uses the terms "derives" and "goods," thereby indicative of multiple sales.

In the case at bar, there are no repeated sales of Gerritse calendering machines in Massachusetts. There is only one resale of a Gerritse calendering machine for the equivalent amount of $45,875 in United States currency which constitutes 1.2% of Gerritse's revenue for the year in question. In Mark v. Obear & Sons, Inc., 313 F.Supp. 373, 375-376 (D.Mass. 1970), the court determined that annual revenue of $5,000, despite a small sales ratio of .5%, constituted substantial revenue. Mark, however, involved repeated sales of hand saws in Massachusetts for a number of years.

The issue in the case at hand is undeniably close. Stork bears the burden of proof. In the event Gerritse, through Stork, had sold a greater number of calendering machines in Massachusetts or at least more than one, Stork might have met its burden. There is, however, no evidence in the record to support such a conclusion. Because of the small percentage of revenue, coupled with the fact that there exists only one resale, Stork fails to meet its burden.

Notwithstanding the failure of Stork to meet its prima facie

burden under the long arm statute and the principle that courts should avoid deciding cases on constitutional grounds, this court will address whether Gerritse's contacts with this forum satisfy the Due Process Clause because of the closeness in which Stork fails to meet the substantial revenue test.

B. THE DUE PROCESS CLAUSE

The "Constitutional touchstone for personal jurisdiction is the existence of minimum contacts between the defendant and the forum state. United Electrical Radio and Machine Workers of America v. 163 Pleasant Street Corporation, 960 F.2d at 1087. In determining that a single unsolicited telephone call from a Massachusetts news reporter to a California resident failed to satisfy the Due Process Clause in a defamation action based on the resulting newspaper article, the court in Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994), summarized the framework used to analyze minimum contacts in a case involving specific jurisdiction.

First, the plaintiff must "demonstrate that its cause of action 'arises out of, or relates to,' [the] defendant's contacts with the forum state." Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994). Second, the plaintiff must show that the defendant "'purposefully availed itself of the privilege of conducting activities in the form [s]tate.'" Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). Finally, the court's exercise of jurisdiction must comport with principles of "'fair play and substantial justice.'" Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994) (quoting International Shoe Co. v. State of Washington, 326 U.S. 310, 320 (1945)).

The inquiry is not mechanical and is more of "an art than a science." Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994); United Electrical Radio and Machine Workers of America v. 163 Pleasant Street Corporation,

960 F.2d at 1087-1088. The court should weigh each case individually on the merits of the pertinent facts. Id. at 1088; see also Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994) (court may assess relative weight of the plaintiff's showings of relatedness and purposeful availment in determining the fundamental fairness of exercising jurisdiction).

Turning to the relatedness inquiry, this prong focuses on the relationship between the defendant's conduct and the cause of action. It "is the divining rod that separates specific jurisdiction cases from general jurisdiction cases." It also ensures that causation plays a role in the due process analysis. Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994). Thus, the cause of action must arise out of or relate to the defendant's forum based activities. Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994) (citing United Electrical Radio and Machine Workers of America v. 163 Pleasant Street Corporation, 960 F.2d at 1089 & n. 9 for this principle).

Gerritse's forum based activities and their relatedness to the cause of action are few in number. First, this suit would not have arose but for Gerritse's alleged negligent or defective manufacture of the calendering machine at issue. It is also true that Gerritse contracted with Stork, B.V. to sell Gerritse products on the "international market," including the United States. Gerritse did not, however, contract directly with either a Massachusetts company or a Massachusetts resident. And, although Gerritse manufactured the calendering machine at issue, the manufacturing took place in The Netherlands. It was only through the intervening contract with Stork, B.V. and Stork, B.V.'s subsequent sale to plaintiff's Massachusetts employer, that the calendering machine found its way to Massachusetts. These intervening acts serve to make Gerritse's forum based activities more attenuated and more indirect. Except for a personal visit on the part of Jan Gerritse (Docket Entry # 41, ¶ 10), Gerritse has no other contacts with Massachusetts. Thus, although this case presents a scenario

of specific jurisdiction, see Boudreau v. Scitex Corporation, Ltd., 1992 WL 159667 at * 3 (D.Mass. June 25, 1992) (noting distinction between specific and general jurisdiction); see also Donatelli v. National Hockey League, 893 F.2d 459, 463 (1st Cir. 1990), Stork submits only a marginal showing that Gerritse's forum based activities relate to the cause of action asserted in the third party complaint.

Stork must also show that Gerritse purposefully availed themselves of the privilege of conducting activities in Massachusetts. Purposeful availment incorporates two salient characteristics of the defendant's contacts. Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994). One characteristic is foreseeability and the other is voluntariness.

Gerritse voluntarily contracted with Stork, B.V. Contrary to Stork's argument, however, Gerritse did not voluntarily direct its products into Massachusetts. Rather, Gerritse accepted a stock order from Stork, B.V. in 1983. In May and June 1985, Gerritse manufactured the machine at issue in accordance with the specifications provided by Stork, B.V. After Gerritse finished manufacturing the machine and in the course of preparing the calendering machine for shipping, Stork, B.V. supplied Gerritse with the name and address of Stork's Massachusetts buyer.

Nor did Gerritse voluntarily send its employees into Massachusetts to service the machine at issue. Dekens traveled to Massachusetts for one day on Stork's behalf as Stork's representative. See Benitez-Allende v. Alcan Aluminio Do Brasil, S.A., 857 F.2d 26, 29 (1st Cir. 1988), cert. denied, 489 U.S. 1018 (1989) (noting that the individual who traveled to the forum state called himself the defendant's "sales representative"). Dekens serviced the machine in August and September 1985, admittedly after Stork had identified the Massachusetts buyer. It is significant, however, that Dekens performed the work in Belgium, not in Massachusetts.

With respect to foreseeability, Gerritse remained unaware of the Massachusetts destination of the machine until Stork

supplied Texmach with a telex in July 1985. During the manufacturing process, Gerritse did not know the location of Stork's buyer. Unlike the franchisee in Burger King Corporation v. Rudzewicz, 471 U.S. 462 (1985), Gerritse did not affiliate itself with a company based in the forum state. Moreover, it was not foreseeable that Gerritse would manufacture machines for the Massachusetts market simply because Gerritse entered into a contract with an entity having an international market.

The two cases cited and relied on by Stork[7] are distinguishable on their facts. The defendant in Benitez-Allend v. Alcan Aluminio Do Brasil, S.A., 857 F.2d 26, 29 (1st Cir. 1988), "manufactured thousands" of pressure cookers for the United States market and 240,000 individuals in the forum state purchased the product. The defendant also hired an individual who traveled to the forum state and met with another individual who became the defendant's sales representative in the forum state. At least four times a year, the defendant's sales representative travelled to the forum state. In contrast, while Stork sold an undetermined number of Gerritse calendering machines in the United States, Stork sold only one Gerritse calendering machine to a Massachusetts buyer. Furthermore, Gerritse did not send sales representatives, including Dekens, to actively solicit sales in Massachusetts on Gerritse's behalf.

As to the Heins case, the defendant's sale of the machine in Heins "was not an isolated occurrence," Heins v. Wilhelm Loh Wetzlar Optical, 522 N.E.2d 989 (Mass.App.ct. 1988), as in the case at bar. The defendant in Heins also "sent its [emphasis added] employees to" the forum state "to visit existing or prospective customers at three different companies." Heins v. Wilhelm Loh Wetzlar Optical, 522 N.E.2d at 996. In comparison,

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[7] Benitez-Allende v. Alcan Aluminio Do Brasil, S.A., 857 F.2d 26 (1st Cir. 1988); Heins v. Wilhelm Loh Wetzlar Optical, 522 N.E.2d 989 (Mass.App.Ct. 1988).

Dekens worked on the machine at issue in 1985 in Belgium and traveled to Massachusetts to service the machine at issue once in 1986 for a one day period on Stork's behalf.

Finally, before examining whether it is fair to exercise jurisdiction over Gerritse, this court notes that entering into a contract with a Massachusetts resident or corporation does not, by itself, establish jurisdiction in Massachusetts. Burger King Corporation v. Rudzewicz, 471 U.S. at 478 (individual's contract alone cannot automatically establish sufficient minimum contacts); accord Bond Leather Co., Inc. v. O.T. Shoe Manufacturing Company, Inc., 764 F.2d at 933-934 (1st Cir. 1985) (court should examine whether the defendant made purposeful decision, independent of entering into contract, to participate in the forum state's economy); see also A-Connoisseur Transportation Corporation v. Celebrity Coach, 742 F.Supp. 39, 43 (D.Mass. 1990) (single visit to Massachusetts after entering into contract deemed insufficient to establish requisite Massachusetts contacts). Not only did Gerritse not contract with a Massachusetts corporation but Gerritse never engaged in the additional activity necessary to meet the constitutional minimum for jurisdiction. See Bond Leather Co., Inc. v. O.T. Shoe Manufacturing Company, Inc., 764 F.2d at 933-934 (citing additional contacts needed to support jurisdiction).

In sum, Stork's showing of relatedness is weak and it fails to demonstrate that Gerritse purposefully availed themselves of the benefits and protections of a Massachusetts forum.

This court's exercise of personal jurisdiction must be reasonable and comport with traditional notions of fair play. See Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 (D.Mass. April 13, 1994) (citing World Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980) and International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) and holding that assertion of jurisdiction over the defendant cannot be "fundamentally unfair"). The geographical distance between Gerritse, based in The Netherlands, and Massachusetts is dramatic.

Gerritse would suffer substantial expense in litigating this case in Massachusetts. (Docket Entry # 27, ¶ 9). "[I]nconvenience to the defendant weighs heavily in the jurisdictional balance." Ticketmaster-New York, Inc. v. Alioto, 1994 WL 114817 at * 9 (D.Mass. April 13, 1994). Massachusetts has little, if any, interest in protecting the finances of Stork or in ensuring that Stork is adequately reimbursed or indemnified for Gerritse's alleged negligent manufacture of the calendering machine at issue.

On the other hand, Massachusetts has an interest in ensuring compensation for personal injuries to its resident (plaintiff) and a number of the witnesses to plaintiff's injuries likely reside in Massachusetts. Further, it would be beneficial to have all parties involved in the occurrence litigate their claims in a single forum.

On balance, however, it does not appear fair to have a corporation based in The Netherlands litigate this action in Massachusetts simply because it contracted with a company with an international market and, at the behest of the company, sent a machine to a Massachusetts entity.

In short, Stork fails to make a prima facie showing to satisfy Due Process. Dismissal for lack of in personam jurisdiction over Texmach and Ing. Gerritse is therefore appropriate.

As to Gerritsen Projekten, B.V. named in the third party complaint (Docket Entry # 16) or Gerritse Projecten as noted in Stork's opposition (Docket Entry # 33), Jan Gerritse avers that at the time he signed the September 1975 contract, he was doing business as Gerritse Projecten. The contract is made in the name of Gerritse Projecten. Gerritse Projekten appears above the signature line. Jan Gerritse attests that there is no such entity as Gerritsen Projekten, B.V. As previously noted, Gerritse also makes the motion to dismiss on behalf of Gerritsen Projekten, B.V., despite its nonexistence. To the extent there is no in personam jurisdiction over Texmach and Ing. Gerritse, there is also no in personam jurisdiction over Gerritsen Projekten, B.V.

Hence, dismissal of Gerritsen Projekten, B.V. as named in the third party complaint is proper.

II. PLAINTIFF'S MOTION FOR LEAVE OF COURT TO AMEND COMPLAINT (DOCKET ENTRY # 43)

Plaintiff seeks leave to file an amended complaint. (Docket Entry # 43). As to Stork, Inc. and Stork, B.V., plaintiff simply reorganizes his prior complaint by adding counts previously included in counts contained in the prior complaint. In particular, plaintiff included proposed counts one through six in the prior complaint, albeit less artfully. Stork did not file an opposition to plaintiff's motion for leave to amend. Notwithstanding the 17 month delay, amendment to include these counts is appropriate.

Plaintiff also moves to add counts seven through 15 against Gerritsen Projekten, B.V., Texmach and Ing. Gerritsen, B.V. based on theories of negligent design, failure to warn and breach of implied warranties. Gerritse and Gerritsen Projekten, B.V. oppose amendment, in part, on the grounds that amendment is futile because of the absence of in personam jurisdiction over Gerritse and Gerritsen Projekten, B.V. (Docket Entry # 45).

Denial of a motion for leave to amend on the grounds of futility is proper. Demars v. General Dynamics Corp., 779 F.2d 95, 99 (1st Cir. 1985); Liberty Leather Corp. v. Callum, 653 F.2d 694, 700 (1st Cir. 1981). A proposed amendment is futile if it cannot survive a motion to dismiss. Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 59 (1st Cir. 1990).

In lieu of presenting a prima facie case of in personam jurisdiction over Gerritse and Gerritsen Projekten, B.V., plaintiff simply represents that counsel became convinced that this court could obtain jurisdiction over Gerritse and Gerritsen Projekten, B.V. (Docket Entry ## 44 & 62). For reasons stated with respect to Gerritse and Gerritsen Projekten, B.V.'s motion to dismiss, this court lacks in personam jurisdiction over these entities. Thus, while cognizant that plaintiff stands in a different position than Stork and Massachusetts therefore has a stronger interest in

providing a convenient forum to its residents, plaintiff's motion for leave to amend is futile on jurisdictional grounds.

CONCLUSION

For the foregoing reasons, this court **RECOMMENDS**[8] that the motion to dismiss Texmach, Ing. Gerritse and Gerritsen Projekten, B.V. (Docket Entry # 24) be **ALLOWED**. This court further **RECOMMENDS** that plaintiff's motion for leave to amend (Docket Entry # 43) be **ALLOWED** with respect to counts one through six contained in the proposed amended complaint filed on October 19, 1993, and **DENIED** as to proposed counts seven through 15.

MARIANNE B. BOWLER
United States Magistrate Judge

[8] Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten days of receipt of the Report and Recommendation to which objection is made and the basis for such objection. Any party may respond to another party's objections within ten days after service of the objections. Failure to file objections within the specified time waives the right to appeal the district court's order. United States v. Escoboza Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JOSE M. D'ALMEIDA, Plaintiff, v. STORK-BRABANT, B.V. and STORK-BRABANT, INC., Defendants/ Third-Party Plaintiffs v. GERRITSEN PROJECTEN, B.V., TEXMACH, B.V. and ING. GERRITSEN, B.V., Third-Party Defendants.	Civil Action No. 92-10944-RCL

STIPULATION CLARIFYING EVIDENTIARY POINT

Third-party plaintiffs Stork Brabant B.V. and Stork Brabant, Inc. (collectively "Stork") and third-party defendants Texmach B.V. and Ing. Gerritse B.V. (collectively "Gerritse") respectfully submit this stipulation in order to clarify one factual point about which there appeared to be some confusion in United

States Magistrate Judge Bowler's Report and Recommendation of July 7, 1994 (the "Report").

1. In the Report, it is suggested that Ronald Dekens "worked on the machine at issue in 1985 in Belgium," Report at 19; see also id. at 18 ("Dekens serviced the machine in August and September 1985 . . . in Belgium"), 8 ("Dekens ... worked on the calendering machine at issue for Stork in Belgium"). Those suggestions in the Report are incorrect.

2. Stork and Gerritse agree, and herein stipulate, that the machine on which Dekens worked in Belgium in August and September 1985 belonged to the DeWitte Lietaer firm, as reflected in Exhibit "2" to Ronald Dekens' Affidavit of August 20, 1993. That Belgian machine is not the machine at issue in this case. So far as Stork and Gerritse know, that machine has never been in Massachusetts, or had anything to do with Massachusetts.

STORK BRABANT B.V. and
STORK BRABANT, INC.,
By their attorneys,

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Dated: July 26, 1994

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the within document was served upon the attorney of record for each party by mail.

Dated: 7/28/94 Jeffrey P. Trout

UNITED STATES CONSTITUTION

RIGHTS OF CITIZENS

AMENDMENT 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS GENERAL LAWS

223A:3. Transactions or conduct for personal jurisdiction.

Section 3. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's

(a) transacting any business in this commonwealth;

(b) contracting to supply services or things in this commonwealth;

(c) causing tortious injury by an act or omission in this commonwealth;

(d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth;

(e) having an interest in, using or possessing real property in this commonwealth;

(f) contracting to insure any person, property or risk located within this commonwealth at the time of contracting;

(g) maintaining a domicile in this commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or

child custody; or the commission of any act giving rise to such a claim;

(h) having been subject to the exercise of personal jurisdiction of a court of the commonwealth which has resulted in an order of alimony, custody, child support or property settlement, notwithstanding the subsequent departure of one of the original parties from the commonwealth, if the action involves modification of such order or orders and the moving party resides in the commonwealth, of if the action involves enforcement of such order notwithstanding the domicile of the moving party.

231B CONTRIBUTION AMONG JOINT TORTFEASORS

§1 Right of contribution; subrogation

(a) Except as otherwise provided in this chapter, where two or more persons become jointly liable in tort for the same injury to person or property, there shall be a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution shall exist only in favor of a joint tortfeasor, hereinafter called tortfeasor, who has paid more than his pro rata share of the common liability, and his total recovery shall be limited to the amount paid by him in excess of his pro rata share. No tortfeasor shall be compelled to make contribution beyond his own pro rata share of the entire liability.

(c) A tortfeasor who enters into a settlement with a claimant shall not be entitled to recover contribution from another tortfeasor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(d) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, shall be subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision shall not limit or impair any right of subrogation arising from any other relationship.

(e) This chapter shall not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee shall be for indemnity and not contribution, and the indemnity obligor shall not

be entitled to contribution from the obligee for any portion of his indemnity obligation.

§2 Pro rata share of tortfeasors in entire liability; determination

In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered; (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply.

§3 Enforcement of contribution; limitation; effect of judgment against one tortfeasor; judgment determining liability

(a) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two or more tortfeasors for the same injury, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(d) If there is no judgment for the injury against the tortfeasor seeking contribution, his right of contribution shall be barred unless he has either (1) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, or (2) agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution.

(e) The recovery of a judgment for an injury against one tortfeasor shall not of itself discharge the other tortfeasors from liability for the injury unless the judgment is satisfied. The satisfaction of the judgment shall not impair any right of contribution.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for an injury shall be binding as among such defendants in determining their right to contribution.

§4 Release or covenant not to sue one or more tortfeasors; effect

When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury:

(a) It shall not discharge any of the other tortfeasors from liability for the injury unless its terms so provide; but it shall reduce the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(b) It shall discharge the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

§85 Comparative negligence; limited effect of contributory negligence as defense

Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the total amount of negligence attributable to the person or persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made. In determining by what amount the plaintiff's damages shall be diminished in such a case, the negligence of each plaintiff shall be compared to the total negligence of all persons against whom recovery is sought. The combined total of the plaintiff's negligence taken together with all of the negligence of all defendants shall equal one hundred per cent.

The violation of a criminal statute, ordinance or regulation by a plaintiff which contributed to said injury, death or damage, shall be considered as evidence of negligence of that plaintiff, but the violation of said statute, ordinance or regulation shall not as a matter of law and for that reason alone, serve to bar a plaintiff from recovery.

The defense of assumption of risk is hereby abolished in all actions hereunder.

The burden of alleging and proving negligence which serves to diminish a plaintiff's damages or bar recovery under this section shall be upon the person who seeks to establish such negligence, and the plaintiff shall be presumed to have been in the exercise of due care.

Supreme Court, U.S.
FILED
APR 10 1996
CLERK

No. 95-1443

REPRINTED COPY

In the Supreme Court of the United States

OCTOBER TERM, 1995

STORK BRABANT B.V. AND
STORK BRABANT, INC.,
Petitioners,

v.

JOSE D'ALMEIDA
and
GERRITSE PROJECTEN AND
ING. GERRITSE B.V.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

BRIEF OF RESPONDENT ING. GERRITSE B.V. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A1

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In the Supreme Court of the United States

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STORK BRABANT B.V. AND
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BRIEF OF RESPONDENT ING. GERRITSE B.V. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Statement of the Case

Petitioners' brief fails to address fully certain material facts, and misstates others. Accordingly, respondent Ing. Gerritse B.V. ("Gerritse") sets forth a summary of relevant additional facts

necessary to this Court's review of the pending Petition for Writ of Certiorari.

A. *Procedural History*

This action involves a third-party claim for contribution and indemnity brought by petitioners Stork Brabant B.V. and Stork Brabant, Inc. (collectively "Stork") against Gerritse. Stork is the defendant in a suit in federal district court in Massachusetts brought by an injured plaintiff, Jose D'Almeida. After the District Court endorsed the Magistrate Judge's Report and Recommendation, which found in part that Gerritse was not constitutionally subject to jurisdiction in Stork's action for contribution and indemnity, Stork moved under Fed. R. Civ. P. 54(b) for the entry of a separate and final judgment dismissing its third-party action so that it might immediately appeal the allowance of Gerritse's motion to dismiss. Stork's 54(b) motion was granted by the District Court.

Petitioners note that at one time the tort plaintiff, D'Almeida, sought to amend his complaint in the District Court to include Gerritse as a defendant. This motion was denied. However, D'Almeida has never sought interlocutory review of the District Court's denial of his effort to add Gerritse as an additional defendant, and the First Circuit expressly limited its decision to the issues presented by Stork's claim. Thus the action before this Court is limited to the third-party contribution and indemnity issue between Stork and Gerritse.

B. *Factual Background*

The petitioners correctly state that the relationship between Stork and Gerritse arises out of a contract the parties signed in September of 1975 regarding the manufacture and sale of "calender" machines. (Petition at 7). The contract provided that Gerritse would manufacture the calender machines and sell them

to Stork, which would then undertake to sell the machines to buyers in the Netherlands or internationally. (Petition at 8; App. to Opp. Brief at A1-A11). In order to assess fully the unfairness inherent in allowing Stork to hale Gerritse into a Massachusetts courtroom, however, a few additional facts from the Magistrate Judge's Report are helpful.

Stork and Gerritse signed their 1975 agreement in Boxmeer, The Netherlands. (Petition at A21; App. to Opp. Brief at A11). The contract specified that the governing law relating to all issues arising from the agreement was that of the Netherlands, provided for arbitration in that country of all disputes between the parties, and provided that any disputes not subject to arbitration would be submitted exclusively to the courts of the Netherlands. (Petition at A21-A22; App. to Opp. Brief at A10-A11). The specific contractual language is as follows:

> Article 11 - Applicable law.
>
> 11.1 The agreement shall be governed by the laws of the Netherlands.
>
> 11.2 The Dutch courts shall have exclusive competence in any cases in which a public judicial authority could be involved.
>
> Article 12 - Disputes.
>
> 12.1 Any disputes arising in connection with the agreement or any further agreements arising therefrom, including those which only one of the parties considers to be a dispute, shall be settled by an arbitral award.
>
> 12.2 Such rulings shall be rendered with due application of the arbitration

rules laid down in the Rules of the Netherlands Arbitration Institute.

App. to Opp. Brief at A10-A11.

At the time that the parties entered into the contract in 1975, Gerritse employed six individuals and generated 1.1 million guilders in business. (Petition at A22). In contrast, Stork B.V. employed approximately 23,000 persons and did about 1.9 billion guilders in business. (Petition at A22). Gerritse customarily built and sold the calendering machines for Stork without knowledge of the eventual destination of such machines. Indeed, the calendering machine at issue in the instant case was ordered by Stork in 1983, and built by Gerritse without any knowledge of the location of the eventual purchaser. (Petition at A23). Not until July 2, 1985, after Gerritse had fully completed manufacture and modification of the machine in accordance with Stork's specifications, did Stork inform Gerritse that the machine was to be sent to Massachusetts. (Petition at A24).

II. Reasons For Denying The Writ

THE DECISION OF THE FIRST CIRCUIT IS FULLY IN ACCORD WITH SETTLED LAW REGARDING THE CONSTITUTIONAL LIMITS OF A COURT'S EXERCISE OF PERSONAL JURISDICTION OVER A NON-RESIDENT DEFENDANT, AND NO EXCEPTIONALLY IMPORTANT ISSUE OF LAW IS PRESENTED BY THE PETITION TO WARRANT SUPREME COURT REVIEW.

A. *The Petition Does Not Satisfy Any of the Standards Governing the Grant of a Writ of Certiorari As Set Forth in the Rules of This Court.*

The instant petition seeks review of decisions of the District Court and the First Circuit that are fully in accord with well-established principles of constitutional due process in the

exercise of personal jurisdiction. This Court has indicated the character of the reasons that will be considered in deciding whether to grant a writ of certiorari; this case satisfies none of the following:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Sup. Ct. R. 10.1.

The petition in this case identifies no important question of federal law, no split of opinion among the circuit courts, and no deviation by the First Circuit from the established doctrine of this Court. Moreover, even were this Court to choose to revisit or elaborate on its jurisprudence regarding the constitutional limits of personal jurisdiction, the particular factual setting in the instant case, and the limited nature of the First Circuit's holding, make

this action an unsuitable vehicle for doctrinal elaboration. For these reasons and those set forth below, the petition should be denied.

B. *The First Circuit Correctly Ruled That the Assertion of Jurisdiction Over Gerritse In Stork's Action For Indemnification and Contribution Is Unconstitutional.*

The United States Constitution guarantees that any court's exercise of *in personam* jurisdiction over a foreign defendant must comply with due process of law. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). According to this Court, due process imposes a requirement that the assertion of jurisdiction be "consistent with traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). To assess whether this requirement is met in a particular case, the Court has formulated a five-factor test to access the constitutionality of a court's exercise of personal jurisdiction over an out-of-state defendant. These factors are: (1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

Although the First Circuit in the instant case, presumably because it felt the unfairness of exerting jurisdiction over Gerritse was "reasonably clear" without detailed explanation (Petition at A2), did not apply all of the above five factors to the circumstances of this case, a brief examination of each one confirms that the First Circuit correctly held that personal jurisdiction could not constitutionally extend to Gerritse.

(1) Burden of Appearance

This Court has found that the burdens on a defendant of appearing in a distant forum are entitled to substantial weight in calibrating the jurisdictional scales, and has stated that this element, alone among the five above factors, is "always a primary concern." *World-Wide Volkswagen, supra,* 444 U.S. at 292. In this case, those burdens are extremely heavy. Gerritse's sole place of business is located thousands of miles from Massachusetts, in the Netherlands. It is a small company for whom travel by its personnel to this distant court would be an unreasonable burden. Moreover, the federal district court in Massachusetts employs a different language, and is part of a different legal system, from the home jurisdiction of Gerritse. Indeed, it was precisely to avoid the possibility of such burdens that Gerritse agreed contractually with Stork that the parties would resolve all disputes in the Netherlands. On these facts, therefore, it would be extremely onerous and unfair for Gerritse to be forced to defend against the Stork companies' claims in Massachusetts.

Petitioners seek to obfuscate the heavy burden on Gerritse of appearing in federal court in Massachusetts by exaggerating the connection of an engineer named Ronald Dekens with that jurisdiction. Dekens traveled to the United States in November 1986 at the direction of Stork to visit two of Stork's customers in New Jersey and Pennsylvania. (Petition at A24). While in the U.S., Dekens made a brief stopover (one day) in Massachusetts at the behest of Stork to examine the Shawmut Mills machine. This scant one day visit is the only contact Gerritse has ever had with the Massachusetts forum. (Petition at A25). Moreover, irrespective of the weight given to the Dekens visit, petitioners' invocation of it in support of a "minimum contacts" theory is misplaced, since the First Circuit's opinion expressly found it unnecessary to address the issue of minimum contacts.

(2) Interest of Forum

Massachusetts has little or no interest in the outcome of the Stork companies' dispute with Gerritse. Gerritse does not regularly do business in or maintain contacts with Massachusetts, and its transfer of the machine in question to the Stork companies was "an isolated transaction, with slight effect on the commerce of the Commonwealth." *Droukas v. Divers Training Academy, Inc.*, 375 Mass. 149, 154, 376 N.E.2d 548, 551 (1978). Moreover, the Stork companies are not Massachusetts residents, and their claims against Gerritse are for indemnification or contribution with respect to alleged acts or omissions in the Netherlands. Thus, for the same reasons set forth by this Court in *Asahi Metal Industry Co., Ltd. v. Superior Court,* Massachusetts' "legitimate interests in the dispute [are] considerably diminished." 480 U.S. 102, 114 (1987).

The petitioners advance two separate arguments regarding the interest of Massachusetts in its claim for indemnification and contribution, both of which are undermined upon closer scrutiny. First, petitioners attack the First Circuit's finding that "Massachusetts' interest in the indemnification and contribution dispute [is] extremely limited . . ." (Petition at A3), claiming instead that Massachusetts has an interest in furthering the "fundamental social policies" embodied in the state's statutory contribution scheme. (Petition at 17-18). But as the petitioners' own authority suggests, the contribution statute is primarily intended to promote an equitable relationship between joint tortfeasors. As the Massachusetts Supreme Judicial Court found, "[t]he object to be accomplished [by the contribution statute] is a more equitable distribution of [the] burden among those liable in tort for the same injury." *McGrath v. Stanley*, 397 Mass. 775, 780-81, 493 N.E.2d 832, 835 (1986) (cited in Petition at 18-19). Given this limited legislative concern, it is doubtful that Massachusetts has any significant interest in the resolution of this dispute. Both Stork and Gerritse are incorporated in the

Netherlands, and contractually agreed to resolve all disputes in the mutually familiar forum of their country of residence. It is settled law that courts should abide by a forum selection agreement to which the parties to a dispute agreed before the dispute arose. *See, e.g., The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 10 (1972) (forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unenforceable' under the circumstances."); *Lambert v. Kysar*, 983 F.2d 1110, 1116 (1st Cir. 1993) (forum selection clause enforced). Because the very Massachusetts statute on which petitioners rely has as its primary motivation the equitable relation between joint tortfeasors, even this limited forum state interest supports the inherent fairness of requiring the parties to litigate their dispute in the consensually selected forum of the Netherlands.

Perhaps recognizing the extremely limited nature of Massachusetts' interest in the contribution and indemnity action alone, petitioners seek to inject the interests of the original plaintiff in the District Court tort action, D'Almeida, into the more limited matter before this Court. (Petition at 19-20). The dispute that the First Circuit ruled on, and that is now before this Court, is solely an action for contribution and indemnity between Stork and Gerritse, and the First Circuit took explicit note of that fact in ruling as it did. (Petition at A3).

Although the plaintiff D'Almeida at one point unsuccessfully sought to amend its complaint and add Gerritse as an additional defendant, D'Almeida to date has declined to seek appellate review of the District Court's denial of such amendment. Should D'Almeida in the future ever choose to appeal the District Court's denial of his attempt to add Gerritse as a defendant, the narrowly tailored holding of the First Circuit in this action will not limit D'Almeida on appeal. Indeed, the First Circuit carefully limited its holding below to the particular factual background and procedural setting of the contribution and indemnity action

between Stork and Gerritse, cautioning that its analysis would be different if the D'Almeida were a party involved in the appeal. (Petition at A2). Because D'Almeida's interests are not implicated in the instant action before this Court, petitioners' invocation of D'Almeida's interests for their own purposes is misplaced.

(3) Plaintiff's Convenience

It is settled doctrine that "courts considering jurisdictional issues generally should 'accord plaintiff's choice of forum a degree of deference in respect to the issue of its own convenience.'" *Foster-Miller, Inc. v. Babcock & Wilcox Canada,* 46 F.3d 138, 151 (1st Cir. 1995) (quoting *Ticketmaster-New York, Inc. v. Alioto,* 26 F.3d 201, 211 (1st Cir. 1994)). In this case, the Stork companies chose the Netherlands as their preferred forum for resolving all disputes with Gerritse, expressly setting that choice forth in a written and binding contract.

Moreover, courts have made clear that they will look to the objective realities of convenience, and not solely to the plaintiff's assertions. *Ticketmaster*, *supra*, 26 F.3d at 211. Here, the realities are that the relevant witnesses are in the Netherlands, and speak Dutch. Likewise the relevant documents are in Dutch, and are located in the Netherlands. The relevant objective circumstances cause this factor to weigh against finding that it would be reasonable to proceed in Massachusetts.

(4) Administration of Justice

Petitioners suggest that forcing Gerritse into the Massachusetts forum would promote the efficient administration of justice by having all claims tried together in a single forum. (Petition at 16-17). Yet it is far from clear that the assertion of personal jurisdiction over Gerritse by the District Court of Massachusetts would promote the efficient resolution of the

dispute between Stork and Gerritse. Under the parties' contract, all disputes must be resolved by arbitration, or by litigation, and in either case in the Netherlands. (App. to Opp. Brief at A10-A11). To subject Gerritse to suit in Massachusetts would therefore lead to parallel adjudication proceeding before two distant tribunals. The inefficiency and potential for inconsistent judgments inherent in such a scenario weighs against the exercise of federal court jurisdiction over Gerritse in this case.

(5) Policy Concerns

This Court has noted that special policy concerns attach when courts in the United States consider extending their jurisdiction to foreign defendants in other nations. As the Court stated in *Asahi*:

> [Courts must] consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by [a state's] court. The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."

Asahi, *supra*, 480 U.S. at 115 (quoting *United States* v. *First National City Bank*, 379 U.S. 378, 404 (1965)) (emphasis in

original); see also 9 U.S.C. §§201 et seq. (United States committed by treaty to honor foreign arbitrations). In according due deference to the interests of the Netherlands, the Court should take into account that nation's interest in protecting its citizens from burdensome foreign litigation. Accordingly, public policy considerations of every sovereign involved weigh heavily against the imposition of jurisdiction here.

Considered together, the five factors enumerated above confirm the wisdom of the First Circuit's holding that the extension of jurisdiction over Gerritse would offend the constitutional requirement of "fair play and substantial justice." Gerritse is a small manufacturer in a single Dutch town that entered into a contract with a large company also resident in the Netherlands. The petitioners now seek the intervention of this Court in order to force Gerritse into a Massachusetts courtroom thousands of miles from its home country -- not at the behest of an injured Massachusetts citizen, but on the pleading of a compatriot corporation with whom Gerritse had entered into a contract on Dutch soil. This contract contained a forum selection clause in favor of the Netherlands. As the First Circuit held, the inherent unfairness of haling Gerritse into a Massachusetts court to defend Stork's contribution and indemnity action precludes the constitutional exercise of personal jurisdiction in this case.

C. *Conclusion*

For the forgoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Translated text of agreement dated September 1, 1975, between Stork Brabant B.V. and Gerritse Projecten, submitted as part of Record before the First Circuit Court of Appeals.

SWORN TRANSLATION

"AGREEMENT

the private company with limited liability, "Stork-Brabant B.V." residing in Boxmeer (Noord-Brabant), the Netherlands, at no 43a, Wim de Korverstraat, hereafter to be referred to as: 'Stork', party of the first part;

and

"Gerritse Projecten", residing in Brummen, the Netherlands, at no. 17, Mercuriusweg, hereafter to be referred to as: 'Gerritse', party of the second part;

whereas:

Gerritse has developed a paper wrapping machine and a calendering machine for a vapor-phase transfer printing process. These machines shall be specified in further detail below.

Stork produces a range of machines for the textiles industry and sells these on the international market. The machines described above are compatible with that range, and Stork therefore wishes to include these machines in its sales program on an exclusive basis;

Gerritse is willing to complete the development of the machines in collaboration with Stork and to grant Stork the exclusive right to sell these machines. Stork hereby accepts this sales right, so that

the parties have laid down their collaboration and agreement in the following terms and conditions.

Article 1 - Subject

1.1 The parties shall cooperate in:
- developing calendering machines
- producing calendering machines

in the sense that Stork shall assume exclusive responsibility for the sale of the calendering machines in its own name and for its own account and risk.

1.2 The parties have agreed on the following distribution of tasks in respect of the production of the calendering machines;
Gerritse shall produce calendering machines with a transfer cylinder of up to 700 millimetres in diameter, hereafter to be referred to as: 'the A-calenders'.

1.3 Stork shall purchase the A-calenders exclusively from Gerritse and the latter shall sell these calendering machines exclusively to Stork. Stork shall itself produce any special type of calendering machines which a buyer may order and which are not included in either party's production program or shall order these from third parties.

1.4 The A-calender is characterized by the following general description:
A transfer calender for transferring colors from a carrier onto textile according to a vapor phase process, consisting of a frame with:

- an electrically-heated transfer cylinder with temperature control,
- a pressure strip with pressure adjustment and control,

- winding and unwinding facilities with spindles for:
  - transfer paper,
  - textiles and
  - protective paper
- a drive with speed control.

Article 2

2.1 Gerritse has developed a paper wrapping machine which Stork intends to include in its sales program in combination with the calendering machines.

2.2 Stork shall purchase the paper wrapping machines exclusively from Gerritse, and Gerritse shall sell these paper wrapping machines exclusively to Stork. Stork shall itself produce any special designs not included in Gerritse's production program, or shall order them from third parties.

2.3 The wrapping machine referred to above in 2.1 is characterized by the following general description:

A paper wrapping machine for wrapping, for monitoring the printed transfer paper and for cutting it into longitudinal segments, consisting of a frame with:

- an electrically-operated transversely-controlled unwinding frame for steering the paper track, with paper track tension control
- a longitudinal cutting section
- a viewing and cutting area
- a winding facility with spindles for approved and rejected paper
- a drive with speed control
- no facility for rewinding the paper

Article 3 - Stork's obligations

3.1 Stork shall, for its own account and risk, purchase the A-calenders and the paper wrapping machines from Gerritse, shall immediately include them in its sales program and sell them or, as the case may be, have them sold on the international market.

3.2 In doing so, Stork intends to ensure a certain degree of continuity in respect of the turnover in this field, which it shall attempt to achieve with all the specialized knowledge of the market which it has at its disposal.

3.3 Stork shall not request Gerritse's support for its commercials and/or service activities in undertaking the above, unless it should consider this necessary for developing the machines.

3.4 Stork shall order the A-calenders in series of ten, and the wrapping machines in series of five.

3.5 The prices, which shall not include Value Added Tax, shall be as follows until 1 January 1976:

- thirty-six thousand Dutch guilders (NLG 36,000) per TC-101 transfer calendering machine, and
- twenty-nine thousand, one hundred and eighty Dutch guilders (NLG 29,180) per TR-101 wrapping machine,

and the agreed terms of delivery shall be ex factory Brummen, excluding packaging.

3.6 Stork has ordered a first series of both types of machine before signing the present agreement, and the following payment schedule has been stipulated in respect of this order: fifty (50) percent upon ordering and fifty (50) percent within 30 days of delivery.

3.7 The parties shall review the prices and terms of payment every six months by joint consent.

3.8 Stork undertakes to place orders for a sum of at least one million and fifty thousand Dutch guilders (NLG 1,050,000) in the first two years of the agreement, viz. in the period between September 1, 1975 and September 1, 1976 and between September 1, 1976 and September 1, 1977.

3.9 If Stork should fail to realize this turnover on Gerritse's behalf, Stork shall be entitled to compensate its obligations by placing orders with Gerritse or in cash. If Stork should pay this compensation in cash, it shall pay Gerritse fifteen (15) percent of the turnover lost. If Stork should opt for compensating Gerritse by placing orders, it must do so to a sum which is at least equal to the turnover lost. If Stork should provide materials as well as the complete working drawings and specifications which it is required to provide at all times, the compensation shall consist of orders with a value of at least seventy (70) percent of the turnover lost.

3.10 Stork shall take over the service and warranty on the machine supplied.

3.11 Stork shall pass on to Gerritse any information which it obtains from and on the market for these machines, both in general and in respect of these machines, and shall provide Gerritse with any technical and technological support which is in reason possible for developing and modifying the machines to bring them into line with the market needs.

Article 4 - Gerritse's obligations

4.1 Gerritse shall continue to develop the A-calenders and wrapping machines and, in doing so, shall be guided by

the needs and demands of the market, of which Stork shall keep Gerritse informed.

4.2 Gerritse hereby grants Stork the exclusive sales rights for the A-calenders.

4.3 Although Stork has taken over all the service and warranties under the terms of section 3.11 above, Gerritse shall continue to warrant the machines' proper operation and defect-free materials, and shall furthermore provide all the spare parts necessary for complying with the warranty obligations to Stork free of charge. This warranty shall be valid for a period of six months after the machines are commissioned, with a maximum however of twelve months from the agreed delivery date. The pressure strip shall be excluded from Gerritse's warranty obligations.

4.4 If Stork so wishes, Gerritse shall continue to supply spare parts for its machines at normal prices and under normal terms for a period of five years after the machines have been supplied, even after the agreement has been terminated.

4.5 Gerritse shall keep a reserve stock of spare parts for any parts which Stork may require pursuant to the above, and as additional security for Stork's service obligations. Gerritse and Stork shall agree on this stock by joint consent.

4.6 Stork is aware of the fact that Gerritse will be obliged to contract out seventy to eighty percent of its work. Stork shall not object thereto at any future date, without prejudice to the following:

Gerritse shall ensure that its contracting policies protect Stork's interests, such as ensuring the continuity of the

quality, the delivery period, and that the work is allocated in such a way as to safeguard the exclusive nature of the present agreement.

4.7 If Gerritse should develop machines other than those covered by the present agreement, but which are in line with Stork's sales program, Gerritse shall offer these newly-developed machines to Stork, and shall not enter into any agreement such as the present with any third party before having given Stork the opportunity to give its opinion on the expansion of the present agreement to include the newly-developed machines.

4.8 Gerritse shall make all drawings and technical specifications necessary for drawing up company regulations and parts lists available to Stork.

Article 5 - Term of the agreement

5.1 The present agreement has been entered into for a period of three years commencing on September 1, 1975.

5.2 This period shall be automatically extended by one year unless one of the parties has notified the other of the termination of the agreement by registered letter at least six months before the expiry of the contract period or a contract year.

5.3 If Stork should terminate the agreement lawfully pursuant to this section, it shall, for a period of two years, refrain from producing these calendering machines itself or purchasing them from third parties, as long as Gerritse continues to supply Stork under normal conditions.

Section 6 - Interim termination

6.1 Aside from the provisions of article 5 above, the agreement may be terminated only with both parties' consent.

6.2 However, if one of the parties should be declared bankrupt or go into involuntary liquidation, should file for a moratorium of payments, offer its creditors a private settlement, be placed under a legal restraint or if its powers should be similarly restricted, and in the event of liquidation, the agreement shall be immediately terminated in respect of that party by a notice of termination issued by the other party by registered letter or process-server's writ.

6.3 If any of the events described above should occur to Gerritse, it shall immediately make available to Stork all the drawings and specifications for the machines which Stork may need to complete current orders in a production process under Stork's direction.

6.4 Articles 6.2 and 6.3 shall also be applicable if either party should seriously default in complying with its obligations pursuant to the agreement after having been properly notified of its default. If there should be grounds therefor, the defaultor may be liable to pay damages.

Article 7 - Mutual indemnification

7.1 In accordance with the purport of the agreement, Stork shall indemnify Gerritse against and hold it harmless from all the risks of loss or damage, unless such failure should have been caused by factors for which Gerritse is required to accept liability on the grounds of its obligation to observe due care as the machines' producer and designer,

even if the damage was caused by Gerritse's acts or omissions, and for which Gerritse cannot in reason expect Stork to accept full or partial liability or to bear the consequences thereof in whole or in part.

Article 8 - Confidentiality

8.1 During the term of this agreement, the parties shall make use of all their know-how, experience, technical data, information and other data, to the extent these are not, by their nature, intended for public disclosure, exclusively for the performance of this agreement. The parties shall otherwise observe confidentiality in respect of any aspects of each other's business activities with which they may become acquainted in the course of the present collaboration.

8.2 If either party should need to provide suppliers, customers or other third parties with such information, they also shall ensure that this information is only made available for the specific purpose of the present agreement.

8.3 The obligation to observe confidentiality vis-à-vis third parties shall remain effective after the termination of the present agreement.

8.4 If either party should act in breach of the above provisions of this section, it shall forfeit an immediately payable penalty of one hundred thousand Dutch guilders (NLG 100,000) in favour of the other party as a result of the mere fact of such a breach.

Article 9 - Patents

9.1 If either party should make an invention in connection with the present machines or in connection with their design or technology, it shall be at liberty to apply for a patent itself.

9.2 The parties however explicitly agree that they shall under no circumstances whatsoever use the patent obtained in this way against the other party, and the other party shall on the contrary obtain a free right of use.

9.3 If a third party should sue either of the parties on the grounds of the infringement of a patent belonging to a third party (which is unlikely), the parties shall consult each other on the action to be taken, and such proceedings shall be conducted by the most appropriate party.

Article 10 - The assignment of rights and obligations

10.1 Either party shall be able to assign their rights and obligations only if the other party has granted its prior written permission thereto.

10.2 Stork shall however be authorized to have these calendering machines produced by its companies or licence-holders outside the Netherlands in return for a consideration to be paid to Gerritse, to be fixed as the need arises. If market policies should dictate that such local production is desirable elsewhere in the world, Gerritse shall cooperate in implementing such a decision in every way.

Article 11 - Applicable law

11.1 The agreement shall be governed by the laws of the Netherlands.

11.2 The Dutch courts shall have exclusive competence in any cases in which a public judicial authority could be involved.

Article 12 - Disputes

12.1 Any disputes arising in connection with the agreement or any further agreements arising therefrom, including those which only one of the parties considers to be a dispute, shall be settled by an arbitral award.

12.2 Such rulings shall be rendered with due application of the arbitration rules laid down in the Rules of the Netherlands Arbitration Institute.

Article 13 - Liability for affiliated companies

13.1 The parties warrant that legal persons and business enterprises in which the parties must be considered to have sufficient control, shall observe the obligations under the agreement. Non-compliance by such legal persons or business enterprises shall be considered to constitute non-compliance by the party concerned.

Thus agreed and signed in duplicate in Boxmeer, September 1, 1975

On behalf of Gerritse Projekten	On behalf of Stork Brabant B.V."
[illegible signature]	[illegible signature]

Supreme Court, U.S.
FILED
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No. 95-1443

In the
Supreme Court of the United States
OCTOBER TERM, 1995

STORK BRABANT B.V. AND
STORK BRABANT, INC.,
Petitioners,

v.

JOSE D'ALMEIDA
and
GERRITSE PROJECTEN AND
ING. GERRITSE B.V.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ARGUMENT

I. GERRITSE'S RELIANCE UPON ARBITRATION AND FORUM SELECTION CLAUSES CONTAINED IN ARTICLES 11 AND 12 OF THE AGREEMENT IS MISTAKEN, SINCE GERRITSE IS NOT A PARTY TO THE AGREEMENT AND HAS NO RIGHTS THEREUNDER; AND THE AGREEMENT HAS NO APPLICATION TO STORK'S CLAIMS FOR INDEMNIFICATION AND CONTRIBUTION IN MASSACHUSETTS, WHERE THIS CASE SHOULD BE TRIED.

Respondent Ing. Gerritse B.V. ("Gerritse") commences its *Brief of Respondent in Opposition to Petition for Writ of Certio-*

rari, at p. 1, by commenting that the *Petition for Writ of Certiorari* filed by Stork Brabant, Inc., and Stork Brabant B.V. (collectively, "Stork"), "fails to address fully certain material facts, and misstates others." Although Gerritse then purports to "set[ ] forth a summary of relevant additional facts necessary to this Court's review of the pending *Petition*[,]" it fails to identify a single factual "misstate[ment]" contained anywhere in Stork's *Petition*. Worse than its unfounded criticism of Stork's *Petition*, however, are Gerritse's historically and legally incorrect assertions throughout its brief that it "entered into" or "signed" or is a "part[y]" to the September 1, 1975 Agreement ("the Agreement") between Stork and Jan Gerritse ("Mr. Gerritse"). *See, e.g., Brief of Respondent*, at pp. 2,3,7,9,10,11 and 12.

A. *Dutch Arbitrators Have Already Ruled that Gerritse Has No Rights Under the Agreement, and that They Have No Jurisdiction Over the Dispute Between Gerritse and Stork.*

Stork's *Petition*, at p. 7, correctly stated that when Mr. Gerritse signed the Agreement[1], he was doing business as "Gerritse Projecten." Stork's *Petition*, at p. 4, n.3, also correctly reported that respondent Gerritse *unsuccessfully* sought Dutch arbitration of Stork's claims for indemnification and contribution when it invoked Article 12 of the Agreement.[2] The Dutch arbitral tribunal held:

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[1] The Agreement is reproduced in the Appendix to Gerritse's *Brief of Respondent*, at pp. A1-A11.

[2] *Article 12 - Disputes*

12.1 Any disputes arising in connection with the agreement or any further agreement arising therefrom, including those which only one of the parties considers to be a dispute, shall be settled by an arbitral award.

12.2 Such rulings shall be rendered with due application of the arbitration rules laid down in the Rules of the Netherlands Arbitration Institute.

> Gerritse put forward insufficient proof with regard to the transfer of rights and obligations under the [A]greement of September [1,] 1975 from 'Ing. Gerritse Projecten' to 'Ing. Gerritse B.V.,' let alone with regard to Stork's acceptance of such a transfer.

(SA 12-13).[3]

The panel of Dutch arbitrators therefore concluded that it was "*without jurisdiction* to hear the claims filed by Ing. Gerritse B.V." (SA 22) (emphasis added), and said:

> [T]he arbitral tribunal considers itself incompetent to hear the dispute between Ing. Gerritse B.V. and Stork.

(SA 13).

Gerritse commenced the arbitration proceedings, and since "arbitrator[s] must ultimately pass on the outer boundaries of what is arbitrable[,]" their decision binds Gerritse on this point. *Acevedo Maldonado* v. *PPG Industries, Inc.*, 514 F.2d 614, 617 (1st Cir. 1975). Thus, the basic premise of Gerritse's argument in opposition to Stork's *Petition for Writ of Certiorari* is invalid.[4] But this is not the only shortcoming of Gerritse's *Brief of Respondent*. Its construction of the Agreement and characterization of Stork's claims are equally flawed.

---

[3] The Arbitral Award is reproduced in the Supplemental Appendix to this *Reply*. References to Supplemental Appendix pages are to SA ____. References to Appendix pages from Stork's *Petition* are to App. A ____.

[4] The Court of Appeals erroneously adopted Gerritse's mistaken belief that it was a party to the Agreement (App. A.3) ("their contract included a forum selection clause"), and Judge Bownes followed suit in his concurrence (App. A.5) ("Stork and Gerritse signed a contract"), notwithstanding a contradictory record and appropriate argument from Stork. Gerritse now attempts to perpetuate that myth.

B. *The Agreement Has No Bearing on Stork's Claims for Tort-Based Contribution and Indemnification from Gerritse, and Does Not Oust the District Court of Jurisdiction.*

Article 12 is limited by its terms to "disputes arising in connection with the agreement . . . ," and in no way concerns Stork's third-party action for contribution and indemnification against Gerritse, the designer and manufacturer of the calender machine which is the subject of Jose D'Almeida's tort claim for personal injuries. *See, e.g., Fuller* v. *Guthrie*, 565 F.2d 259, 260-61 (2d Cir. 1977) (claim for breach of contract for personal services held arbitrable where contract called for arbitration of claims, etc., "arising out of or connected with" agreement; but tort claim for slander retained for judicial determination).

Mr. Gerritse correctly observed, by way of affidavit in the District Court, that the arbitration contemplated by the Agreement is of a type "which can and routinely does resolve *commercial disputes* . . ." (emphasis added). The Court of Appeals for the Sixth Circuit has affirmed the distinction between "commercial disputes" and tort-based third-party claims such as those presented here. *Noel* v. *S.S. Kresge Company*, 669 F.2d 1150 (6th Cir. 1982) ("*Noel*").

Noel involved a product liability claim brought by an Ohio resident who was injured while using a pair of pliers purchased at K-Mart. *Id.* at 1152. The Ohio plaintiff filed his action against K-Mart, and K-Mart in turn filed a third-party complaint for indemnification against its supplier, a Japanese trading company. *Id.* "The sale of the pliers [to K-Mart] was evidenced by two documents — an 'Import Order' . . . and a 'Sales Note'. . . ." *Id.* at 1152. The K-Mart Import Order called for the Japanese supplier to indemnify K-Mart, *id.*, while the Sales Note provided:

> Arbitration. In case of dispute arising the case will be settled in Osaka. The dispute should be settled as amicably as possible, failing which the dispute will be referred to the Japan Commercial Arbitration Association in Osaka or Tokyo.

Id. at 1153 (emphasis added).

The Japanese company "maintained that the dispute involved in the third-party action was subject to arbitration in Japan and that suit could be brought only in Osaka." *Id.* As reported by the Sixth Circuit, however, the district court concluded the arbitration provision contained in the Sales Note had no application to the indemnification claim. "*The [district] court found that this arbitration clause referred to commercial disputes, e.g.*, controversies over the quality or quantity of goods shipped, *but did not specify the forum for a claim of indemnification.*" *Id.* (emphasis added). Indeed, the district court further "found that nothing in the Sales Note qualified in any way K-Mart's right . . . to be indemnified against any claim for bodily injury arising from the use of the pliers." *Id.*

The Sixth Circuit affirmed the district court's analysis, saying that "the principal concern" of the arbitration clause, *inter alia*, was "with such *commercial matters*, as quality, quantity, packaging, inspection, licenses and duties, manner of shipment and payment . . . all matters which touch upon *commercial practices* related to international trade." *Id.* at 1155 (emphasis added). The Court concluded, "No such dispute arose between [the Japanese company] and K-Mart with respect to the pliers." *Id.* It then affirmed the plaintiff's judgment against K-Mart and K-Mart's judgment against its suppliers, saying:

> Since *the liability which K-Mart sought to enforce* against Greenhill *arose from a claim of bodily injury* which was tried to judgment in the district court,

> that court was not required to surrender jurisdiction to a Japanese court to try the indemnification claim. The language relied upon by Greenhill does not convince us that it was the intent of the contracting parties that such a claim, based on the judgment of a court in Ohio which concededly had jurisdiction over the underlying personal injury claim, was required to be submitted to a Japanese forum.

Id. at 1156 (emphasis added). Stork's third-party action, which seeks contribution and indemnification from Gerritse with respect to any judgment that D'Almeida obtains against Stork, is simply not a "commercial dispute."[5]

Like Gerritse in its *Brief of Respondent*, at p. 9, the Sixth Circuit also cited *M/S Bremen* v. *Zapata Off-Shore Company*, 407 U.S. 1 (1972) ("*Bremen*"), in *Noel* v. *S.S. Kresge Company*, 669 F.2d at 1155. That Court said it "[was] not unmindful of the deference which is required to be given to forum selection clauses negotiated and agreed to by contracting parties." *Id.* It acknowledged that "if the issue . . . involved a dispute between K-Mart and [the Japanese supplier] concerning performance of the sales contract, an agreement to settle the matter in Japan would be enforced . . . However, K-Mart made no claim that [its supplier] breached the contract of sale." *Id.* at 1156. "*[T]he liability which K-Mart sought to enforce . . . arose from a claim of bodily injury [in Ohio] . . . .*" *Id.* And, like the District Court in this case, the district court in *Noel* "had jurisdiction over the underlying personal injury claim," *id.*

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[5] Gerritse alludes to 9 U.S.C. §§ 201 *et seq.*, in its *Brief of Respondent*, at p. 12. That statutory provision concerns the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, where the United States has exercised its option and declared that it will apply the Convention only to differences which are considered as "commercial". 9 U.S.C. § 201, Article I, ¶3, n. 58. This case thus falls outside the Convention, and the rule and reasoning of *Noel* should apply.

Article 11 of the Agreement,[6] upon which Gerritse also relies in his *Brief of Respondent*, is equally unavailing to him, for although it states that "[t]he agreement [is] governed by the laws of the Netherlands[,]" the liabilities of the parties arising out of a tort claim for personal injury in the United States are not. *See, e.g., Home Owners Funding Corp. of America* v. *Century Bank*, 695 F.Supp. 1343, 1346, n.2 (D. Mass 1988) ("as matter of law . . . this provision refers to the contract rights of the parties and in no way limits the application of Massachusetts tort and statutory law to them"). Furthermore, there is no provision in the Agreement concerning "cases" like the instant one, where the plaintiff, D'Almeida, has sued in an American Court and the Dutch courts simply are not and cannot "be involved."[7] In short, Stork and Jan Gerritse "did not have th[is] particular controversy in mind when they made their agreement" back in September of 1975. *Bremen*, 407 U.S. at 17.

C. *D'Almeida Supports Stork's Petition Because D'Almeida's Claims, and Stork's Claims Against Gerritse, Should Be Tried Together In Massachusetts.*

This particular dispute is an essentially local one to Massachusetts, inherently more suited to resolution there than in the Netherlands. *Cf. Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991). The very things which make trial of a

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[6] *Article 11 - Applicable Law*

11.1 The agreement shall be governed by the laws of the Netherlands.

11.2 The Dutch courts shall have exclusive competence in any cases in which a public judicial authority could be involved.

[7] Gerritse also invokes "the interests of the Netherlands," but the Dutch courts treat an American judgment as *res judicata* even where a Dutch defendant relies upon a contractual forum selection clause and raises jurisdictional defenses. Dutch decisional law to this effect was presented to the Magistrate Judge and made a part of the record.

case "easy, expeditious and inexpensive" are, in this case, found in Massachusetts. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947). The plaintiff, his eyewitnesses, expert witnesses, medical witnesses and medical records are all located in Massachusetts. The calender machine which is the focus of D'Almeida's and Stork's claims is located in Massachusetts. The plant where the accident occurred, Shawmut Mills, is located in Massachusetts, as are its records concerning the plaintiff, the machine and the accident. And plaintiff's claims are governed by Massachusetts law, as are Stork's claims for statutory contribution and common law indemnification against Gerritse.

"There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Id.* at 509. This Court also stated in *Bremen* that "selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an *important public policy of the forum*." *Bremen*, 407 U.S. at 17 (emphasis added). Although this Court upheld the choice-of-forum provision in *Bremen*, it was careful to note that a "contractual choice of forum clause should be held unenforceable if enforcement would contravene a *strong public policy of the forum* in which suit is brought, whether declared by statute or by judicial decision." *Id.* at 15 (emphasis added). Massachusetts' strong, expressed interest in applying its product liability law, rule of joint and several liability, and statutory right of contribution, are discussed at length in Stork's *Petition*, at pp. 17-20.

The District Court allowed that "it would be beneficial to have all parties involved in the occurrence litigate their claims in a single forum." (App. A34.) A similar sentiment was expressed in the Memorandum of Decision (App. A15, A16) that

accompanied the Order for entry of separate and final judgment (App. A10, A11). The District Judge wrote, "It makes sense, should the decision be reversed, to have Gerritse[] involved in both pre-trial and trial proceedings, so that all of the information can be exchanged at once, and so that all claims may be tried together in one forum." (App. A16.)

The *Brief of Respondent*, at pp. 2 and 9, only reinforces the wisdom of the foregoing observations when it states that "D'Almeida has never sought interlocutory review of the District Court's denial of his effort to add Gerritse as an additional defendant, and the First Circuit expressly limited its decision to the issues presented by Stork's claim[,]" and that "[s]hould D'Almeida in the future ever choose to appeal the District Court's denial of his attempt to add Gerritse as a defendant, the narrowly tailored holding of the First Circuit . . . will not limit D'Almeida on appeal." It is for these very reasons, and for those expressed in Stork's *Petition*, at pp. 19-20, that D'Almeida *supports* Stork's *Petition for Writ of Certiorari* (SA 25-26).

The fates of D'Almeida and Stork are inextricably linked. Because the Magistrate Judge reported that Stork had failed to present "a *prima facie* case of *in personam* jurisdiction over Gerritse[,]" she recommended that D'Almeida's motion to add Gerritse as a direct defendant be denied as "futile on jurisdictional grounds." (App. A35-36.) The District Judge followed her recommendation (App. A17). Later, the Court of Appeals affirmed the dismissal of Stork's third-party claims, saying the case would be "especially difficult" if D'Almeida had brought suit against Gerritse and if compensation for his injury had been "at stake." (App. A3.)

The result thus presents a procedural conundrum not present in *Asahi Metal Industry Co.* v. *Superior Ct. of California*, 480 U.S. 102, 114 (1987), where the plaintiff had settled his claims with all defendants. In this case, D'Almeida has been

prevented from suing Gerritse because Stork has not satisfied the lower courts as to *in personam* jurisdiction; and Stork has been unable to satisfy those courts because D'Almeida has not been allowed to sue Gerritse. The unfairness of this situation is palpable, and only this Court can rectify it.

Conclusion.

For these reasons, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Counsel for Petitioners

I hereby declare that the following is to the best of my knowledge and ability a full, true and faithful translation of the Dutch document annexed hereto, which was submitted to me for translation.

Hengelo (O), April 7, 1994

A.E.C.M. Beusink
Sworn in as a translator before the District Court of Almelo on December 2, 1987.

Netherlands Arbitration Institute
NAI 1552
March 30, 1994

ARBITRAL AWARD

in the case of:

1. TEXMACH B.V.

and

2. ING. GERRITSE, B.V.

both companies having their registered and business offices in Brummen, the Netherlands,
plaintiffs,
attorney: C.P. Aubel of Nijmegen;

versus

STORK BRABANT B.V.

having its registered and business offices in Boxmeer, the Netherlands,
defendant,
attorney: L. Hardenberg of Amsterdam

Arbitrators:
H.J.C. ter Kuile, residing in Olst
B.C.J. Sjollema, residing in Rotterdam
C.C.Th. van Andel, residing in Vinkeveen

The members of the arbitration tribunal, acting as good and reasonable arbitrators in conformity with Article 455d1 of the Rules and Regulations adopted by the Netherlands Arbitration Institute, have rendered the following award:

Indication of parties

1. The plaintiffs will be referred to individually as "Texmach" and "Ing. Gerritse B.V.", respectively, or collectively as the "plaintiffs". The defendant will be referred to below as "Stork".

Summary of the arbitral procedure

2. In their request for arbitration dated July 15, 1993, the plaintiffs filed their complaint. The appointment of the arbitrators was confirmed by way of a letter of appointment addressed to the arbitrators and dated August 23, 1993. The arbitrators accepted their appointment in writing.

Prior to the oral hearing of January 19, 1994, the parties submitted the following documents:

- the plaintiffs' request for arbitration along with one exhibit, dated July 15, 1993;
- a brief reply on Stork's part, dated July 29, 1993;
- the plaintiffs' statement of claim, dated October 21, 1993;
- the plaintiffs' additional statement of claim, undated (sent on October 29, 1993);
- Stork's statement of defence along with three enclosures, dated December 21, 1993;
- six exhibits on the plaintiffs' part, sent on January 10, 1994.

On January 19, 1994, an oral hearing was held before the arbitral tribunal in Amsterdam. This hearing was attended by the following persons:

- for the plaintiffs: Ing. J. Gerritse and the plaintiffs' attorney;
- for Stork: J.P. Witsen Elias (corporate counsel) and Stork's attorney;
- the arbitrators and P.J. van der Korst, Secretary.

Subsequent to the oral hearing of January 19, 1994 but prior to the oral hearing of March 2, 1994, the parties submitted the following documents:

- a letter from the plaintiffs' attorney with approximately 80 pages of enclosures, dated January 31, 1994;
- a reply, with 14 exhibits, from Stork, dated February 15, 1994.

The continued hearing took place on March 2, 1994 and was attended by the same persons who were present at the

oral hearing of January 19, 1994.
The plaintiffs' attorney defended his clients' case in further detail on the basis of a "brief reply to the motion contesting jurisdiction" and a pleading. Stork's attorney also defended his client's case by means of a pleading. The three documents were submitted to the tribunal.

Claims and defence

3. The plaintiffs made the following claims in their statement of claims and additional statement of claim:

"1. Stork Brabant B.V. should be ordered to immediately cancel the Third-Party Complaint filed in the U.S.A. against the plaintiffs and Stork should be ordered to pay a penalty of NLG 50,000 for each day that it fails to comply with this order.

2. Stork Brabant should be ordered to pay to the plaintiffs any and all damage which they have already suffered and will suffer as a result of their being wrongly involved in the U.S. procedure. This damage amounts to no less than NLG 111,416.77 and Stork should in any event be ordered by arbitral decision to pay this amount, increased by legal interest from this day until the day of final payment. Any additional damage still needs to be assessed in further detail.

3. The arbitrators should declare that Stork Brabant B.V. will be obliged to indemnify the plaintiffs against any disadvantage that has arisen or may arise for the plaintiffs from D'Almeida's assertions in the U.S. procedure that he was injured when handling a calender which Stork alleged had been

delivered by the plaintiffs to Stork Brabant B.V. This particularly applies to any detrimental effects ensuring for the plaintiffs from any complaint which D'Almeida may file against the plaintiffs in the U.S.A.

4. The arbitrators should declare that Stork Brabant B.V. will be obliged to indemnify the plaintiffs against any disadvantage that has arisen or may arise for the plaintiffs from the fact that Stork Brabant Inc. filed a Third-Party Complaint against the plaintiffs with the United States District Court for the District of Massachusetts, Boston, U.S.A.

5. Stork Brabant B.V. should be ordered to pay the costs of arbitration and any legal aid fees incurred by the plaintiffs with a view to these arbitral proceedings."

4. In its statement of defense, Stork concludes as follows:

"For these reasons, Stork demands that the arbitrators declare themselves incompetent to hear this case or that they reject the plaintiffs' claim for procedural reasons or on the merits. Stork further requests that the plaintiffs be ordered to pay the costs of arbitration, including the statement of legal fees to be presented by Stork's attorney."

Established facts

5. The following facts are established either on the grounds that they have been asserted by one party and have not been disputed or have been insufficiently disputed by the other party or on the grounds of the undisputed contents of the exhibits and enclosures:

a. In the course of 1992, a plaintiff, Jose M. D'Almeida, filed a complaint against Stork and Stork Brabant Inc. (a North American subsidiary of Stork established in North Carolina) with the United States District Court for the District of Massachusetts. D'Almeida claimed that on or about February 22, 1991, he had been injured when operating a metal stock straightening machine. D'Almeida alleged that Stork and Stork Brabant Inc. were liable for this injury as the parties who had marketed the injury inflicting machine (a calender).

b. In the framework of said proceedings, Stork and Stork Brabant Inc. filed a Third-Party Complaint against the plaintiffs and "Gerritse Projecten B.V." for the apparent purpose of requesting that the District Court order the plaintiffs and Gerritse Projecten B.V. to compensate Stork and Stork Brabant Inc. for any sums that they may owe to D'Almeida, as well as for the costs of the proceedings versus D'Almeida and those related to the Third-Party Complaint.

c. Stork and Stork Brabant Inc. claimed that the calender concerned had been designed, developed, manufactured and supplied by the plaintiffs and/or Gerritse Projecten B.V. and that the plaintiffs and/or Gerritse Projecten B.V. should therefore be called upon to hold Stork and Stork Brabant Inc. harmless.

d. At the end of April and the beginning of May 1993, the plaintiffs filed the "Motion of Texmach B.V. and Ing. Gerritse B.V. for dismissal or stay of

Third-Party Action" and a "Memorandum in support of Gerritse's motion to dismiss or stay", requesting that the District Court dismiss the Third-Party Complaint or to stay any decision in that respect pending the present arbitration procedure.

e. On June 1, 1993, Stork and Stork Brabant, Inc. filed their "Memorandum of Third-Party Plaintiffs Stork Brabant B.V. and Stork Brabant Inc., in opposition to motion for dismissal or stay of Third-Party Action", requesting that the plaintiffs' defence stated above in item d. be denied.

f. On October 6, 1993, D'Almeida submitted a motion to the District Court for leave to implead the plaintiffs and Gerritse Projecten B.V. in the principal action against Stork and Stork Brabant Inc.

g. The calender to which D'Almeida referred in the above-mentioned action had been ordered by Stork by telex of May 13, 1985 directed to "Gerco NL/Gerritse". By telex of June 10, 1985, signed by "Machinefabriek Gerritse B.V./J. Gerritse", a more detailed price quotation was given for the calender. Texmach billed for the delivered calender by way of its invoice to Stork, dated August 30, 1985.

h. On September 1, 1975, Stork and "Gerritse Projecten" had concluded an agreement (signed by Ing. J. Gerritse) concerning the development, manufacture and supply of calenders. Article 12 of this agreement contained an arbitration clause pursuant to which the arbitration provisions set

forth in the Rules and Regulations adopted by the NAI, the Netherlands Arbitration Institute, were declared applicable.

Jurisdiction of arbitrators

6. Since Stork invoked the arbitration tribunal's lack of jurisdiction for its entire defence, such on the grounds that the plaintiffs and Stork had not concluded a valid arbitration agreement, this arbitral tribunal, having summarized the parties' positions in this regard, will first rule on its own jurisdiction.

Summary of positions taken by the parties with regard to the tribunal's jurisdiction

7. Stork invoked the tribunal's lack of jurisdiction on the following grounds:

   a. Stork is not bound to either plaintiff under the arbitration clause set out in the agreement of September 1975.
   In 1975, Stork concluded an agreement with "Gerritse Projection", that is, with Mr. Gerritse. The relationships between the separate Gerritse companies, including the plaintiffs, are vague, but Stork believes that these companies have every appearance of being in fact only operating companies of Mr. Gerritse.

   b. The question as to who is the contractual party is not decided by the fact of who sends the invoices, but who accepts and performs the orders. The dispatch of invoices in the name of Texmach does not necessarily mean that the agreement of

September 1975 was valid between Stork and Texmach. The invoices contain no direct reference to the agreement. On the contrary, the invoices refer to the Smecoma Conditions, which provide for the exclusive jurisdiction of the court competent to hear civil law matters.

c. The question as to whether an arbitration clause may be invoked successfully against the defendant in the principal action who also acts as plaintiff in a third-party action can only be answered by the court judging the principal complaint in accordance with the procedural law governing that court.

d. In view of the nature of D'Almeida's complaint, the arbitration clause is not applicable.

e. As between the parties, the statutory requirement of written proof supporting the agreement has not been met (Article 1021 of the Dutch Code of Civil Procedure).

f. Stork's assertions in the U.S. procedure concerning the alleged contractual relationship established with the plaintiffs cannot be held against Stork in these proceedings, even insofar as these assertions can be regarded as deviating from the assertions put forward in these arbitration proceedings. In addition, in the U.S. procedure, Stork remained inconclusive about the question whether the agreement of September 1, 1975 had been continued with one or more of the plaintiffs and, if so, with whom. Furthermore, Stork remained vague about the legal ground underlying its request for a third-party action; it rather alluded to all conceivable

possibilities relating to that issue.

8. The plaintiffs argued that they had submitted for Gerritse Projecten (the sole proprietorship run by Mr. Gerritse) as party to the agreement of September 1975 (and therefore the arbitration clause) and that they had thus assumed the rights and obligations ensuing from the agreement.
The plaintiffs submitted the following grounds to defend their position:

a. Stork filed a Third-Party Complaint against the plaintiffs in the United States, as described above, on the basis of (inter alia) an agreement concerning the supply of calenders. The only agreement to which Stork could have referred was the above-mentioned agreement of September 1975 or any ensuing agreement.

b. The plaintiffs referred to the large number of invoices related to calenders supplied, including the calender concerned in these proceedings. These invoices were drawn up and sent by Texmach to Stork and were paid by Stork to Texmach. These invoices must have been sent for the supply of calenders under the agreement of September 1975.

c. The agreement concluded by Texmach and Stork on September 7, 1992 referred to the agreement of September 1975 and included the following statement: "By letter of February 28, 1989, Stork notified Texmach that the agreement would be terminated as of August 31, 1989."

d. The agreement of September 1975 was drafted by Stork; any ambiguity in the (wording of the)

arbitration clause and the parties bound by the clause must be construed against Stork.

Decision on the jurisdiction dispute

9. As concerns the jurisdiction dispute, the arbitral tribunal rules as follows:

- The agreement of September 1, 1975, including an arbitration clause, was concluded and signed by "Gerritse Projecten". At the time of conclusion, "Ing. Gerritse Projecten" was a business conducted by Ing. J. Gerritse in the form of a sole proprietorship; the plaintiffs' corporations had not yet been incorporated.

- In August of 1979, Texmach was incorporated. As evidenced by enclosures 9 and 11 of Stork's reply, "Ing. Gerritse Projecten" contributed assets and liabilities to Texmach and its operations were allocated retrospectively to October 1, 1978 to Texmach at the latter's risk and expense.
  Texmach was recorded in the trade register under the number which had formerly applied to "Ing. Gerritse Projecten".

- As evidenced by the invoices submitted by the plaintiffs' attorney in his letter of January 10, 1994, the calenders supplied to Stork, including the calender concerned in this case, were invoiced by Texmach.

- These invoices were paid by Stork.

- Stork (partly) based its Third-Party Complaint in

the U.S. action on the existence of a contractual relationship between Stork and the plaintiffs.

- The recitals of the agreement of September 7, 1992 between Stork and Texmach provided that Stork had terminated the agreement of September 1975 by way of its letter dated February 28, 1989 to Texmach.

10. In view of the foregoing, the arbitral tribunal holds that "Ing. Gerritse Projecten's" rights and obligations under the agreement of September 1975 were transferred to Texmach and that, after this transfer, Stork continued its relations with the manufacturer of the calenders without showing any concern about the identity of its contractual party or parties and without demanding that Stork's written consent be obtained for the transfer. Stork always accepted the invoices sent by Texmach for contractual performances rendered and Stork always satisfied its own contractual obligations towards Texmach. Therefore, the agreement of September 1975, including the arbitral clause set forth in Article 12, was continued between Stork and Texmach. Thus, there is a document which provides for arbitration and which has indeed been accepted by Stork.
Since the parties agreed on a separate arrangement in this respect, the general reference in Texmach's invoices to the Smecoma Conditions and choice-of-forum clause contained in those Conditions do not apply to the parties.

11. The arbitral tribunal is therefore competent to hear the dispute that has arisen between Texmach and Stork.

12. The plaintiffs put forward insufficient proof with regard to the transfer of rights and obligations under the agreement of September 1975 from "Ing. Gerritse Projecten" to "Ing.

Gerritse B.V.", let alone with regard to Stork's acceptance of such a transfer.

13. Therefore, the arbitral tribunal considers itself incompetent to hear the dispute between Ing. Gerritse B.V. and Stork.

Summary of assertions in support of the principal dispute

14. In view of the tribunal's ruling on the motion contesting jurisdiction, the arbitral tribunal will hereafter exclusively address the dispute between Texmach and Stork.

15. Texmach's claims can be summarized as follows:

- it requests that the tribunal order Stork to cancel the Third-Party Complaint against Texmach in the U.S. procedure;
- it requests that the tribunal order Stork to pay any and all damages that Texmach has suffered and will suffer as a result of its involvement in the U.S. procedure;
- it requests that the tribunal issue a declaratory ruling, stating that Stork must hold Texmach harmless from any detrimental effects ensuing from D'Almeida's allegations in the U.S. procedure that he suffered injuries when handling a calender which Stork believed had been supplied by Texmach;
- it requests that the tribunal declare that Stork must hold Texmach harmless from any detrimental effects ensuing from the fact that Stork Brabant Inc. filed a Third-Party Complaint against Texmach in the U.S. procedure;
- it requests that the tribunal order Stork to pay the costs of these arbitral proceedings.

16. In summary, Texmach justified its claims as follows: The Third-Party Complaint which Stork filed in the U.S. procedure was contrary to the arbitration clause in the agreement of September 1975. This arbitration clause limited the possibilities for the parties to make use of applicable general rules of procedural law anywhere in the world. In the agreement concerned, the arbitration clause was incorporated particularly to prevent the situation currently brought about by Stork. The relationship between the parties was of such a nature that Texmach was to supply Stork the calenders ordered by Stork and that Stork was to market these calenders worldwide at its own risk and expense, supplying them to end users. Any dispute which was to arise between Texmach and Stork about the supply of calenders would be settled and still must be settled by arbitration in the Netherlands.

17. Texmach also argued that the parties had agreed that Texmach would not be liable towards end users for any calenders supplied by Stork. Stork agreed with Texmach that Stork would take out product liability insurance and that it would protect Texmach through such insurance from any third-party claims. Texmach was only to be liable towards Stork for damage caused by errors in design and workmanship. Stork, however, had failed to put forward any facts and circumstances which would prove such damage.

18. In summary, Stork defended itself as follows against these allegations:
The arbitration clause in the agreement of September 1975 does not preclude Stork from filing a Third-Party Complaint against Texmach in the U.S. procedure. The purpose of a Third-Party Complaint (comparable with the concept of "vrijwaring" in Dutch procedural law) is to

settle a claim against a third party and the principal action to which the relevant claim is obviously connected as much as possible in one and the same procedure. This purpose also implies jurisdiction for the court which is competent to hear the principal claim.

19. In Stork's views, it is up to the court in the principal action to answer the question as to whether the arbitration clause precludes the impleading of Texmach. The court's answer must be given in conformity with the procedural rules of law governing the court. The judgment of the U.S. court, rendered after a fair trial and given subject to a statement of reasons, is binding upon the parties and has authority towards both the Dutch court and the Dutch arbitral tribunal.

20. Stork further argued that the arbitration clause related exclusively to disputes arising from the agreement concerned or any ensuing agreement. The complaint in the U.S.-procedure, which was filed by D'Almeida, however, was not based on any agreement between D'Almeida and Stork or between D'Almeida and Texmach, but was based on the U.S. equivalent of tort. The Third-Party Complaint should therefore have the same basis - tort - so that the arbitration clause does not apply to the dispute between the parties.

21. Stork defended itself against the third claim by asserting that such an unspecified and unlimited indemnification for Texmach's benefit would lack any justification, at least at this point of time. According to Article 7 of the agreement of September 1975, Texmach was to be liable in any event for any adverse effects caused by events which were, in brief, at Texmach's risk. Based on the assumption that D'Almeida's allegations were correct, Texmach would have

to hold Stork harmless rather than the other way around.

22. Finally, Stork contended that the fourth claim was incomprehensible and should be dismissed. Stork Brabant Inc. had nothing to do with the arbitration or the agreement of 1975. No judgment can be awarded against Stork for any act or omission on the part of this third party.

Determination of the main dispute

23. Texmach's claim for withdrawal of the Third-Party Complaint which Stork filed against Texmach must be reviewed against the background of the contractual relations between the parties. As evidenced by the wording of the 1975 agreement, Stork agreed:

> "to include the A-calenders ... forthwith in its sales programs, to purchase the from Gerritse at its own risk and expense and to sell or to have them sold on the international market" (Article 3.1)
>
> Furthermore, Stork agreed:
>
> "for that purpose (that is, to ensure continuity in sales) to refrain from seeking Gerritse's support for its commercial and service activities, unless this is deemed necessary with a view to developing the machines" (Article 3.3)

24. The wording of the agreement shows that the parties intended to cooperate to the extent that Gerritse was to manufacture the machines exclusively for Stork (Article 1.3), that Stork was to purchase the machines exclusively from Gerritse (Article 1.3) and that Stork could sell the machines on an exclusive basis (recitals of the agreement) on the international market, on the understanding that Stork

was to sell the machines in its own name and at its own risk and expense (Article 3.3).

25. With respect to agreements such as the present one, concluded between two parties established in the Netherlands and referring to arbitration in accordance with the rules adopted by the Netherlands Arbitration Institute (NAI), the parties could reasonably construe the arbitration clause in such a manner that any disputes between them would be settled by arbitration in accordance with the rules of the NAI and in principle to the exclusion of any court of law. The parties could also reasonably expect from one another that, in principle, they would not request court interference. Moreover, the agreement of 1975 provided that, if a court of law was nevertheless involved, the court concerned would exclusively be a Dutch court (Article 11.2). The arbitration clause, as construed above, implied that Stork, when sued before a (foreign) court on the grounds of a breach of tort, was not allowed to appeal to the same court for making any alleged claims against Texmach. Stork would have to submit its alleged claim to arbitrators in accordance with the rules of the NAI.

26. The disadvantage of this procedure is that, in (foreign) proceedings, Stork may have to forego the support on which it could have relief if it had been able to summon Texmach before the same court. Another disadvantage is that Stork, having been ordered by the relevant court to pay any sum of money, may not be able to fully or partially recover that sum of money from Texmach in the separate arbitration proceedings. However, in view of the nature of the agreement, these disadvantages will have to be accepted by Stork, which not only agreed to exercise its exclusive sales rights on the international market at its own risk and expense, but which also waived any performance by

Texmach other than the development and manufacture of the machines.

27. Against this background, the arbitral tribunal rules as follows with respect to the first claim. As evidenced by the Third-Party Complaint, submitted by Texmach through its attorney's letter of January 10, 1994, Stork's complaint in the U.S. procedure was filed (inter alia) to obtain a court order against Texmach for compensation of any and all damages and costs which Stork might have to pay to D'Almeida. As evidenced by the Third-Party Complaint, Stork based its claim against Texmach on the fact that Texmach had supplied the calenders to Stork.

28. With reference to the tribunal's consideration with regard to the motion contesting jurisdiction, the tribunal holds that the dispute submitted by Stork in the U.S.A. by way of the Third-Party Complaint against Texmach concerns the performance of the agreement of September 1975 and is therefore a dispute arising from that agreement or any ensuing agreement. Consequently, the dispute must be settled by arbitration as provided in Article 12 of the agreement.

29. By filing the Third-Party Complaint against Texmach, Stork failed to comply with its obligation to submit the dispute concerned to arbitration. Texmach will be afforded an opportunity to request that the arbitral tribunal order Stork to observe the arbitration clause and that any consequences of non-compliance with the arbitration clause be annulled. Therefore, the tribunal considers the first claim admissible. However, the tribunal also finds that there are reasons to mitigate the penalty demanded.

30. As concerns the second claim, the arbitral tribunal holds as

follows:
An arbitral award ordering Stork to compensate any and all damage which has been suffered and will be suffered by Texmach will be admitted only if and insofar as this damage can be attributed to Stork, that is, if and insofar as this damage is a result of Stork's submission of the Third-Party Complaint.

31. Texmach claimed compensation of damage already suffered, which "in any event" amounted to NLG 111,416.77 plus legal interest from October 21, 1993 to the day of final payment. In its statement of claim, Texmach specified this amount as relating to bills received from its Dutch law firm/counsel, the New York law offices of Stibbe simont Monahan Duhot and Ropes & Gray of Boston. These bills amounted to NLG 18,717.86, NLG 57,203.75 and NLG 35,495.16, respectively.

32. As concerns the amount of damages (NLG 111,416.77) specified by Texmach, the arbitral tribunal rules as follows: By way of its attorney's letter dated January 10, 1994, Texmach submitted a number of documents related to the U.S. procedure. According to the third enclosure to that letter, the Third-Party Complaint was served on Texmach on or about August 25, 1992. On or about May 3, 1993, the Third-Party Complaint was contested on behalf of Texmach, among others. it was not until July 15, 1993 that Texmach filed these arbitration proceedings through its attorney.

33. The arbitral tribunal has established that Texmach first defended its case in the U.S. procedure before submitting the complaint to arbitration.

34. The arbitral tribunal must therefore assume that Texmach

could have saved a considerable amount of the costs it wishes to have compensated if it had submitted the dispute to arbitration at a (much) earlier stage. Furthermore, in the absence of adequate specifications, the arbitral tribunal cannot assess what part of the costs specified by the plaintiffs must be considered as necessary to preserve Texmach's rights in the U.S. procedure.

35. In view of the foregoing, the arbitral tribunal requires additional information, for which purpose it intends to summon the parties to appear before the tribunal. The arbitral tribunal requests that, no later than two weeks before the date of appearance, Texmach send (copies of the) records related to the above costs both to the tribunal and to Stork. At the hearing before the tribunal, the possibilities of reaching an amicable settlement on this point will be investigated.

36. As concerns the third claim, the arbitral tribunal holds as follows:
Texmach's assertions are insufficient to clearly establish the facts underlying its claim for indemnification. The fact that D'Almeida contended in the United States of America that he had suffered injuries when handling the calender which Stork alleged has been supplied to Stork by Texmach is insufficient for a review of the question as to whether Stork is obliged to hold Texmach harmless from the resulting claim of D'Almeida. The tribunal is therefore of the opinion that the third claim should not be admitted.

37. As concerns the fourth claim (the sequence is based on the additional statement of claim), the arbitral tribunal rules as follows:
Stork has not contested Texmach's assertion that Stork Brabant Inc., incorporated in 1991, is a wholly-owned

subsidiary of Stork. In Article 13 of the 1975 agreement, the parties guaranteed that "legal entities and businesses over which they are deemed to exercise sufficient control shall comply with the obligations under the agreement."

38. The provisions of Article 13 of the agreement apply to Stork and Texmach to the same extent and on the same grounds as the arbitration clause; the tribunal refers to its considerations in that respect. Since Stork Brabant Inc., a wholly-owned subsidiary of Stork, failed to comply with the obligations under the agreement by filing the Third-Party Complaint against Texmach in violation of the arbitration clause, Stork will have to be held liable for any damage which Texmach may consequently suffer. Therefore, the arbitral tribunal considers the fourth claim admissible.

39. As concerns the fifth claim and Stork's request for an arbitral decision ordering the plaintiffs to pay the costs of these proceedings, the tribunal rules as follows:
In view of the contents of this arbitral award, where the tribunal has found for both parties on different points of action, the arbitral tribunal holds that each party will pay for their own legal fees and that the costs of arbitration will be divided equally among the plaintiffs and Stork.

40. The costs of arbitration, up to the time this award is deposited, will be as follows:

- Fees and out-of-pocket expenses of arbitrators	NLG 41,000
- NAI administrative fees	NLG 900
Total	NLG 41,900

The plaintiffs paid NLG 900 for administrative fees to the

Netherlands Arbitration Institute and deposited a sum of NLG 41,000 in fees and out-of-pocket expenses of the arbitrators. Stork neither paid any administrative fees to the Netherlands Arbitration Institute nor any deposit related to the fees and out-of-pocket expenses of the arbitrators. Said costs of NLG 41,900 will be set off against the payments made for administrative fees and the deposit. Therefore, Stork will have to pay the plaintiffs a sum of NLG 20,950.

Decision

The members of the arbitral tribunal, acting as good and reasonable arbitrators:

I. find themselves without jurisdiction to hear the claims filed by Ing. Gerritse B.V., but with jurisdiction to hear the claims filed by Texmach;

II. order Stork to withdraw the Third-Party Complaint filed against Texmach with the United States District Court for the District of Massachusetts within 30 days after this arbitral award has been deposited, all of this subject to a penalty of NLG 20,000 for each day that Stork fails to comply with this order, up to a maximum of NLG 800,000;

III. order Stork to compensate Texmach for any damage Texmach may suffer as a result of Stork's submission of the Third-Party Complaint referred to above under II, on the understanding that Texmach's damage still needs to be assessed;

IV. Order Texmach and Stork, accompanied by their counsels if so desired, to appear before the arbitral tribunal for the

purpose referred to in paragraph 35 of this award; the date and time of the hearing will be determined in consultation with Texmach and Stork;

V. declare that Stork shall hold Texmach harmless from any adverse effects that have resulted for Texmach or that may result for Texmach from the fact that Stork Brabant Inc. filed the Third-Party Complaint as referred to above under II against Texmach;

VI. order the plaintiffs and Stork, respectively, to pay half of the costs of arbitration as incurred up to the time this award is deposited, calculated at NLG NLG 41,000 for the arbitrators' fees and out-of-pocket expenses and NLG 900 for administrative fees charged by the Netherlands Arbitration Institute, totalling NLG 41,900; declare that these costs will be set off against the amount of NLG 41,000 deposited by the plaintiffs with the Netherlands Arbitration Institute and the amount of NLG 900 paid by the plaintiffs for administrative fees;

VII. order Stork to pay the plaintiffs a sum of NLG 20,950 on the grounds of the aforesaid cost allocation;

VIII. determine that each party shall pay for its own costs;

IX. stay any further decision.

Signed in quadruplicate originals and rendered in Amsterdam on March 30, 1994.

(Signed) (Signed)

H.J.C. ter Kuile C.C.Th. van Andel

(Signed)

B.C.J. Sjollema

March 21, 1996

William K. Suter, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: Jose D'Almeida v. Stork Brabant B.V. and Stork Brabant, Inc. v. Gerritse Projecten and Ing. Gerritse B.V.
No. 95-1443
Our File No. 14917-1

Dear Clerk Suter:

Enclosed herewith please find an Appearance form on behalf of Enid M. Starr of the firm of Barron & Stadfeld, P.C., on behalf of the Respondent, Jose D'Almeida. Please be advised that we do not intend to file a response to the petition for a writ of certiorari.

I would like it noted in the record that the Respondent Jose D'Almeida, plaintiff in the underlying action, supports the petition and position of the Petitioners, Stork Brabant B.V. and Stork Brabant, Inc., first-party defendants in the action below. As set forth on pages 19 and 20 of the Petition for Writ of Certiorari filed by the Petitioners, the Respondent, D'Almeida, remains an active party plaintiff in the underlying action. The Respondent, D'Almeida, is a Massachusetts resident who was injured in Massachusetts and has an obvious interest in the outcome of this dispute. In the action below, D'Almeida moved to amend his Complaint to add the Respondent, Gerritse, as a defendant, but the motion to amend was denied on jurisdictional grounds.

Thank you for your cooperation and courtesy in this matter.

Very truly yours,

BARRON & STADFELD, P.C.

Enid M. Starr

EMS:cjl
Enclosure
cc: John T. Mongtomery, Esq.
John J. McGivney, Esq.